Supreme Court, U.S.
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In The

Supreme Court of the United States

SALLY CORNEJO, individually and
on behalf of her minor son Kevin Salas,

Petitioner,

v.

FREDDA MONN, JODI KAPLAN,
and DAWN SCHWARTZ,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Attorneys for a municipal agency disobeyed client instructions to discontinue a civil case against petitioner. When the petitioner sued for damages under 42 U.S.C. §1983, the courts held the attorneys to have absolute immunity, thereby precluding a claim that the attorneys had unlawfully kept a mother and her young child separated for months.

1. Whether a municipal attorney who contravenes her client's instructions to settle a civil case has absolute immunity in a lawsuit under 42 U.S.C. §1983.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Sally Cornejo and her minor son Kevin Salas were plaintiffs-appellants in the United States Court of Appeals for the Second Circuit. Respondents Fredda Monn, Jodi Appel-Kaplan (sued as "Jodi Kaplan"), and Dawn Shammas (sued as "Dawn Schwartz") were defendants-appellees below. William Bell, Kathleen Cerrito, Janice Hogg, Joyce De Nicholson, Maureen Fleming, Susan Shenkel Savitt, and the City of New York, all of whom were defendants-appellees below, are not parties to this petition. Eugene Weixel and Ramon Vargas were initially defendants in the District Court, but the plaintiffs voluntarily dismissed all claims as to both of them.

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CITATIONS OF OPINIONS BELOW

The opinion of the Second Circuit is published as *Cornejo v. Bell*, 592 F.3d 121 (2d Cir. 2010). (*Infra*, App. 1-18) The opinion of the United States District Court for the Eastern District of New York is available at *Cornejo v. Bell*, 2008 WL 5743934 (E.D.N.Y. May 19, 2008). (*Infra*, App. 19-65). The order of the Second Circuit denying rehearing (App. 66-67) is not published.

BASIS OF JURISDICTION

Jurisdiction of this Court is based upon 28 U.S.C. §1254(1). The United States Court of Appeals for the Second Circuit issued its decision on January 4, 2010. That Court denied petitioner's timely petition for rehearing on March 5, 2010.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. §1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. . . ."

The United States Constitution, Amendment XIV, provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On October 30, 2002, when petitioner Sally Cornejo arrived home from her job at Brooks Brothers, she found her fiancé Rothman Salas holding their six-month-old baby, who was not breathing. The baby was taken to the hospital, where staff reported that the baby had been violently shaken. A few hours later, doctors concluded that the baby also appeared to have suffered a rib fracture several weeks earlier. (App. 4, App. 21-22)

On October 31, 2002, the police interrogated Mr. Salas at the local precinct and then released him. Ms. Cornejo did not hear from him again for several years. (App. 24)

New York City child welfare social workers, who were investigating whether to take custody of the baby and his older brother, infant petitioner Kevin Salas, questioned Ms. Cornejo, who could not explain how her baby had sustained either the supposed rib

fracture or the loss of consciousness. On November 1, 2002, the social workers, represented by attorneys respondents, formally commenced proceedings against both Ms. Cornejo and Mr. Salas (in absentia), in the New York Family Court, alleging that they had abused the baby and thereby endangered Kevin. (App. 25) Attorney respondents, representing the social workers, who had taken custody of Kevin the previous evening, persuaded the Family Court judge to issue an order to retain Kevin in City custody. (App. 6)

Tragically, the baby died on November 7, 2002. (App. 6) Tests showed that he had not suffered a fracture, but instead had been born with a congenital rib malformation. (App. 6) By that time, the social workers had Ms. Cornejo's employment records, which confirmed that she had been at work at the time of the incident in which the baby lost consciousness, and thus could not have shaken the baby. (App. 26-28)

In mid-November, 2002, based upon that new information, the social workers instructed attorney respondents to withdraw the case against Ms. Cornejo and return Kevin to her. (App. 28, App. 49) Though they knew that Ms. Cornejo was completely innocent of abusing her baby, respondents disobeyed their clients' instructions to withdraw the case. (App. 30) Instead, they told the Family Court judge, falsely, that they did not have authority to do so. (App. 70, 71) Although they asked the judge to return Kevin to Ms. Cornejo, their insistence on continuing the case

indicated to the judge that they continued to accuse Ms. Cornejo of child abuse, (App. 69) contrary to their clients' instructions. (App. 29) While the Family Court judge considered the position "duplicitous," (App. 71), the judge accepted the attorneys' claims that the case should continue. Kevin remained away from his mother. (App. 29)

On January 22, 2003, the New York City Medical Examiner reported that the baby had died of a congenital heart defect, not child abuse. (App. 30) The social workers then instructed attorney respondents to withdraw the cases against both Mr. Salas and Ms. Cornejo. (App. 30) Respondents ignored their client's instructions again and instead sought a second opinion, and then a third, from medical examiners in different states. (App. 31)

On February 4, 2003, the Family Court Judge finally ordered the return of Kevin to Ms. Cornejo (App. 31), but under the strict supervision of the social workers. Respondents, by requesting to withdraw the case against Ms. Cornejo but not against Mr. Salas, implied to the Family Court judge, falsely, that their social worker clients still claimed that the baby had been fatally abused by Mr. Salas. (App. 29) By that time, all three experts had concluded that the baby had died from natural causes. (App. 31) The Family Court case against Ms. Cornejo continued.

On May 20, 2003, Ms. Cornejo, having learned of the conclusions of the medical examiner and the independent experts, moved to dismiss the petitions.

(App. 31-32) On June 10, 2003, respondents finally relented, and the case was withdrawn. (App. 32)

On January 28, 2004, petitioner, on behalf of herself and Kevin, filed *Cornejo v. Bell*, 04-CV-341 in the United States District Court for the Eastern District of New York, seeking damages under 42 U.S.C. §1983 against the City of New York and its social workers who had removed Kevin from her, commenced and continued civil child abuse proceedings, and kept her and child separated for three months. (App. 8) She claimed that the social workers had violated her First and Fourteenth Amendment rights to care for her son by seizing and detaining him without due process of law and without probable cause to believe that she was a danger to him. She also claimed that the social workers had violated her Fourth and Fourteenth Amendment right not to be maliciously prosecuted. She claimed that the social workers violated Kevin's Fourth Amendment right to be free of an unlawful seizure and detention. She claimed that the City had an unconstitutional policy of removing children from an innocent parent based on evidence that the other parent may have mistreated the child. She claimed that the City improperly trained its social workers in the areas of investigating alleged child abuse, on taking protective action on behalf of children, and on the due process rights of parents in child abuse and child neglect investigations. She also appended state law claims. (App. 20-21) During discovery, the social workers disclosed that they had instructed their attorneys to

end the child abuse case against Ms. Cornejo and to return Kevin to her, but that the attorneys had disobeyed their instructions, facts which Ms. Cornejo had not previously known.

On June 9, 2006, plaintiff filed *Cornejo v. Monn*, 06-CV-2910 on behalf of herself and Kevin against the City attorneys (the respondents here) who had represented the social workers in the child abuse proceedings in the Family Court, plus the City of New York. She asserted the same claims against attorney respondents that she had asserted against the social workers. In addition, she alleged that the attorney respondents had illegally failed to produce exculpatory evidence. (App. 20-21) The two cases were consolidated in the District Court. (App. 3)

All defendants moved for summary judgment. The District Court granted summary judgment in favor of all defendants. (App. 19-65) The court held that the social workers and attorneys were entitled to absolute, prosecutorial immunity for all of their actions. The court further held that because none of the individual defendants were liable, the City was also entitled to summary judgment. (App. 8)

The Second Circuit affirmed, but on a different basis. (App. 1-18) The Second Circuit determined that the social workers could not claim absolute immunity, but that the uncontradicted facts showed that they were entitled to qualified immunity for removing Kevin from Ms. Cornejo and for starting child abuse proceedings in the Family Court. (The issue of social

worker immunity is not the subject of the instant petition). (App. 11-15) The Second Circuit held that the attorneys were entitled to absolute immunity. (App. 9-11)

REASONS THE WRIT SHOULD BE GRANTED

In granting absolute immunity to municipal attorneys who contravene their clients' instructions to settle civil cases and continue to proceed with civil cases that have no merit, the United States Court of Appeals for the Second Circuit decided an important question of federal law that has not been, but should be, settled by this Court. The issue of entitlement to absolute immunity from suit under 42 U.S.C. §1983 is of extreme importance because it leaves an individual "without civil redress against a [government actor] whose malicious or dishonest action deprives him" of a constitutional right. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). Since state and local governments employ tens of thousands of attorneys,[1] the issue of whether they may be held legally responsible for their misdeeds in civil cases is of interest to those

[1] In 2000, state and local governments employed more than 40,000 attorneys. http://new.abanet.org/marketresearch/PublicDocuments/lawyer_statistical_report_2000.pdf (last visited May 28, 2010). New York City alone has 690 attorneys in its law department. http://www.nyc.gov/html/law/html/about/about.shtml (last visited June 1, 2010).

attorneys and especially to their adversaries who have been harmed by the lawyers' actions.

Moreover, the Second Circuit has decided the question in a way that conflicts with relevant decisions of this Court. The trend in this Court has been to restrict entitlement of government actors to absolute immunity under 42 U.S.C. §1983, not to expand it.

This Court has not previously considered the issue of whether a municipal attorney who contravenes her client's instructions to settle a civil matter is entitled to absolute immunity, under 42 U.S.C. §1983, in a lawsuit brought against the attorney by the individual who was sued, and ultimately prevailed, in that civil matter. This Court, however, has repeatedly enunciated and reaffirmed its rules for analyzing and determining claims of absolute immunity for civil rights defendants in general, rules which the Second Circuit ignored in granting broad, virtually unfettered, absolute immunity to lawyers who represent municipalities and their agencies and employees in civil litigation.

This Court recognizes that "absolute immunity . . . is 'strong medicine. . . .'" *Forrester v. White*, 484 U.S. 219, 230 (1988). It is of a "rare and exceptional

character," and should not be granted lightly. *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985). Thus, this Court has "been quite sparing in our recognition of absolute immunity, and [has] refused to extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). Instead, for "executive officials in general," such as attorney respondents here, qualified immunity "represents the norm." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991).

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULES FOR ANALYZING CLAIMS OF ABSOLUTE IMMUNITY

In evaluating claims of absolute immunity raised by civil rights defendants, this Court mandates the undertaking of a historical analysis, inquiring as to whether similarly situated defendants were entitled to absolute immunity in 1871, when Congress enacted the statute that has become 42 U.S.C. §1983. "Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986). In conducting that inquiry, the court must evaluate "the immunity historically accorded the relevant official at common law and the interests behind it." *Antoine v. Byers &*

Anderson, Inc., 508 U.S. 429, 432 (1993). Where "a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under §1983." *Id.* at 497 (Scalia, J., Blackmun, J., and Marshall, J., concurring in part and dissenting in part). Here, the court below ignored its obligation to undertake a historical analysis and made no mention whatsoever of "the immunity historically accorded [municipal civil lawyers] at common law." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993). The court below bypassed the historical analysis, and instead erroneously started with a functional analysis: "The real distinction between whether an executive employee is entitled to absolute or qualified immunity turns on the kind of function the employee is fulfilling in performing the acts complained of." (App. 10) While a functional analysis is important, petitioners submit that such an analysis may not precede or supplant the historical analysis.

This Court, in determining that prosecutors have absolute immunity for their prosecution of criminal matters, based its holding upon the immunity which criminal prosecutors possessed at common law. *See Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976). By contrast, attorneys who represent litigants in civil matters have not enjoyed absolute immunity from suit for malicious prosecution. At common law, attorneys were not immune when they illegally prosecuted civil cases: "an attorney who causes void or irregular process to be issued in an action, which occasions loss or injury to a party against whom it is

enforced, is liable for the damages thereby occasioned." *Fischer v. Langbein*, 58 Sickels 84, 103 N.Y. 84, 89, 8 N.E. 251, 251 (1886). That "rule is an ancient one, but still valid." *Vernes v. Phillips*, 266 N.Y. 298, 300, 194 N.E. 762, 763 (1935) (citations omitted), *accord*, *Schierloh v. Kelly*, 253 A.D. 373, 2 N.Y.S.2d 188 (2d Dept. 1938) (that an individual acted as the attorney for the plaintiff in a civil action does not immunize him from liability in a lawsuit for malicious civil prosecution filed by the defendant who prevailed in that action). Malicious civil prosecution was a recognized common law tort, and plaintiffs could recover if their "person or property [was] interfered with by some incidental remedy, such as arrest, attachment, or injunction." *Burt v. Smith*, 19 Bedell 1, 181 N.Y. 1, 5, 73 N.E. 495, 496 (1905). An "attachment" of the person was exactly what defendants did to infant petitioner Kevin Salas in the instant case.

Using the historical analysis, this Court has concluded that lawyers who represent private litigants in civil actions do not have either absolute or qualified immunity from lawsuits for malicious prosecution. *Wyatt v. Cole*, 504 U.S. 158 (1992). In holding that immunity from suit is not available to private attorneys charged with §1983 liability for invoking state statutes, this Court held that immunity for private attorneys was not so firmly rooted in the common law, and was not supported by such strong policy reasons as to create an inference that Congress meant to incorporate it into §1983.

Moreover, while the absolute immunity afforded to a criminal prosecutor is historically based on the necessity that the prosecutor "exercis[e] the independence of judgment required by his public trust" and not "shade his decisions" to avoid future lawsuits, *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976), this Court did not consider that factor in *Wyatt*, *supra*, since an attorney in a civil case should not act independently, but instead must advocate for the goals set by his client.

While criminal prosecutors have existed for centuries, attorneys who work for municipalities as their lawyers are a much more recent phenomenon. New York City, for example, "hired private attorneys to oversee the City's legal matters."[2] It was not until 1849 that the City of New York established the position of "Corporation Counsel."[3] Some municipalities still retain private counsel to handle their litigation. *See, e.g.*, *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), in which the City of Louisville, Kentucky, had been represented by outside counsel in the matter which formed the basis of the civil rights action.

More closely related to the attorney respondents here, there was no mechanism whatsoever for involuntarily taking children from the custody of

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[2] http://www.nyc.gov/html/law/html/about/history.shtml (visited May 28, 2010).

[3] *Id.*

their parents because of alleged or actual child abuse in 1871. Thus, in 1874, when neighbors complained that an 11-year-old child was being mistreated, they turned to the Society for the Prevention of Cruelty to Animals, whose lawyers argued that, as members of the animal kingdom, children should be beneficiaries of the animal protection laws.[4] One year later, in 1875, the New York Society for the Prevention of Cruelty to Children was founded as "the first child protection agency in the world."[5] The first civil child abuse laws in the United States, which evolved into New York's present child abuse and neglect laws, were enacted sometime thereafter.

Nor did the profession of social worker exist in 1871. "The first American charity organization society," the precursor of the modern professional social workers, was established in 1877.[6] The New York Summer School for Applied Philanthropy, started in 1898 (27 years after the enactment of the civil rights statute), replaced volunteer "visitors" with "'professional' social workers, some of whom now referred to themselves as 'caseworkers.'"[7] Since social

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[4] Markel, "Case Shined First Light on Abuse of Children," *New York Times*, December 14, 2009; http://www.nytimes.com/2009/12/15/health/15abus.html.

[5] http://www.nyspcc.org/nyspcc/ (visited May 19, 2010).

[6] http://www.boisestate.edu/socwork/dhuff/history/chapts/1-3.htm (visited May 19, 2010)

[7] http://www.boisestate.edu/socwork/dhuff/history/chapts/1-6.htm (visited May 19, 2010).

workers did not "even exist[] in 1871, . . . the argument for granting absolute immunity becomes (at least) more difficult to maintain." *Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J., and Scalia, J., dissenting from the denial of certiorari). Since there were no social workers in 1871, there were necessarily no lawyers who represented social workers in 1871. Congress could not have intended to preserve immunity for a segment of the profession which did not yet exist.

The Second Circuit did not consider the history of immunity afforded to municipal civil attorneys, such as respondents, in reaching its conclusion that they were entitled to absolute immunity under 42 U.S.C. §1983. This Court should.

II. THIS COURT SHOULD DECIDE WHETHER MUNICIPAL ATTORNEYS WHO REPRESENT GOVERNMENTAL CLIENTS IN CIVIL MATTERS PERFORM A PROSECUTORIAL FUNCTION, ESPECIALLY WHEN THE ATTORNEYS DISOBEY THEIR CLIENTS' INSTRUCTIONS

In addition to performing a historical analysis upon claims of absolute immunity, this Court also requires a functional analysis. "In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,' which looks to the nature of the function performed,

not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993), *quoting Forrester v. White*, 484 U.S. 219, 229 (1988).

This Court, in granting prosecutors absolute immunity from liability under §1983 when they perform prosecutorial functions, focused upon the need for the prosecutor to exercise independent judgment on behalf of the People of the State, and upon the prosecutor's accountability to the electorate, as reasons justifying the extension of a prosecutor's common law immunity for malicious prosecution to lawsuits filed under 42 U.S.C. §1983. *Burns v. Reed*, 500 U.S. 478 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

It has been recognized that "absolute prosecutorial immunity extends to those functions 'intimately associated with the judicial phase of the *criminal process*.'" *Hoffman v. Harris*, 511 U.S. 1060 (1994), *citing Imbler v. Pachtman*, *supra* (Thomas, J., and Scalia, J., dissenting from the denial of certiorari; emphasis in original). This Court should clarify whether the absolute immunity protections afforded to criminal prosecutors are in fact available to civil attorneys.

A. The issue is important because no decision of this Court extends prosecutorial immunity to civil cases in general.

This Court has once ruled that certain government attorneys are entitled to absolute immunity for representing clients in civil cases. Thirty-two years ago this Court held that United States attorneys who represent United States administrative agencies in civil proceedings to enforce federal regulations are functionally equivalent to criminal prosecutors and therefore entitled to the same absolute immunity as criminal prosecutors. *Butz v. Economou*, 438 U.S. 478 (1978). This Court explicitly noted that its holding pertained to attorneys who represent "federal officials" in cases to enforce federal regulations. *Id.* at 480. In the ensuing three decades, this Court has not clarified whether *Butz* is to be interpreted so broadly as to encompass all (or any) of the tens of thousands of lawyers who handle civil litigation, representing the thousands of municipalities in this country.

Although this Court has not addressed the issue since 1978, the issue is both important and recurring. Hundreds of lower court decisions have relied upon *Butz* over the past three decades. In general, lower courts have interpreted *Butz* broadly. For example, the Tenth Circuit Court of Appeals has held that a county attorney, representing a physician, who filed a petition to civilly commit the plaintiff to a mental hospital was entitled to absolute immunity. *Scott v.*

Hern, 216 F.3d 897 (10th Cir. 2000). That same court has held that an assistant attorney general who filed a civil child abuse case against parents was entitled to absolute immunity for commencing and continuing the proceedings (which were ultimately withdrawn), and that the same assistant attorney general also had absolute immunity for making misrepresentations to the district attorney, which led to the criminal prosecution of the parents. *PJ ex rel. Jensen v. Wagner*, 2010 WL 1783417 (10th Cir. May 5, 2010). The District of Columbia Circuit, relying upon *Butz*, *supra*, has held that the District's Corporation Counsel had absolute immunity for initiating and conducting civil child neglect actions against a child's custodian (and adult brother). *Gray v. Poole*, 243 F.3d 572, 578 (D.C. Cir. 2001). The Second and Sixth Circuits, relying upon *Butz*, have held that government attorneys who defend civil lawsuits have absolute immunity. *Barrett v. United States*, 798 F.2d 565, 572 (2d Cir. 1986); *Ellison v. Stephens*, 581 F.2d 584 (6th Cir. 1978).

Clarification is needed from this Court as to whether such a broad interpretation is consistent with this Court's intent, and with the intent of Congress, in 1871, in enacting the statute which is now known as 42 U.S.C. §1983.

In other instances, when this Court has been asked to extend the absolute immunity protection of *Imbler* to attorneys in other capacities, this Court has declined to do so. For example, this Court has ruled that public defenders are not entitled to absolute

immunity in lawsuits under 42 U.S.C. §1983. *Tower v. Glover*, 467 U.S. 914 (1984). This Court has also ruled that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client. *Ferri v. Ackerman*, 444 U.S. 193 (1979).

Absolute immunity shields *criminal* prosecutors because the "office of the public prosecutor is one which must be administered with . . . independence." *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). The underlying basis for absolute prosecutorial immunity is to preserve prosecutorial independence and to allow prosecutors to exercise discretion without fear of suit. *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). By contrast, municipal civil attorneys, such as respondents, are not criminal prosecutors and are not independent; they are answerable to a client, not to the public. This Court should decide whether the fact that municipal civil attorneys are answerable to clients, and not permitted to act independently, should control (or affect) the question of whether they are entitled to absolute immunity.

B. The issue is important because this Court has not decided whether prosecutorial immunity applies to municipal attorneys who represent a client, not "The People of the State."

Child abuse proceedings in the Family Court are civil in nature, not criminal. *Matter of Nicole V.*, 71 N.Y.2d 112, 117, 524 N.Y.S.2d 19, 21 (1987); *People v. Smith*, 62 N.Y.2d 306, 311, 476 N.Y.S.2d 797, 799 (1984). Their purpose is to protect children, not to punish parents. *People v. Roselle*, 84 N.Y.2d 350, 355, 618 N.Y.S.2d 753, 755, 643 N.E.2d 72, 74 (1994). Thus, municipal child welfare social workers and their attorneys may commence child abuse proceedings in state juvenile or family courts simultaneously with the commencement of criminal proceedings against the same individuals based upon exactly the same underlying facts, without running afoul of the rule against double jeopardy. *Id.*

This Court has repeatedly recognized the distinction between government civil proceedings commenced to protect children from their parents and government criminal proceedings commenced to bring wrongdoers to justice. Because of that distinction, this Court has repeatedly held that certain basic rights available to criminal defendants are not available to parents who are sued by local governments in civil child abuse proceedings. Thus, in *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 25 (1981), this Court held that parents who are defending cases brought by local

government agencies to terminate their rights to their children are not *per se* entitled to attorneys at taxpayer expense, as are criminal defendants. Proceedings to terminate parental rights are not criminal proceedings, and parents in such cases do not face the loss of "personal freedom."

Likewise, in *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), this Court held that *habeas corpus* is not available to challenge the removal of a child from his parent and the placement of that child in foster care, again distinguishing government-initiated civil child welfare proceedings from criminal proceedings.

And in *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court held that the standard of proof in civil child welfare proceedings is clear and convincing evidence. This Court, in declining to require proof beyond a reasonable doubt, recognized that the interests at stake are more significant than the interests at stake in garden variety civil actions, but do not reach the level of the liberty interests at stake in criminal proceedings.

Because civil child abuse proceedings are intended to perform a beneficent, social services function, rather than a regulatory or punitive function, the analogy of those proceedings to criminal prosecutions is not an exact match, arguably not a match at all. Indeed, when viewed from Kevin's perspective, the civil child abuse proceedings in which he was the "subject child," *see* N.Y. Fam. Ct. Act

§§1051, 1055, were not intended to punish him criminally or to regulate his behavior. On the contrary, he was the purported beneficiary of those proceedings, even if he was in fact their victim.[8] In that respect, New York law is analogous to the laws of all other states, in that state or local agencies may receive federal reimbursement for involuntarily removing a child from his or her parents only if there is a "judicial determination . . . that continuation in the home from which removed would be contrary to the welfare of the child. . . ." 42 U.S.C. §672(a)(2)(ii).[9] This Court should determine whether the differences between civil child abuse proceedings and criminal or regulatory proceedings requires a difference in the

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[8] Kevin's three month loss of his mother was highly traumatic. Infancy is a state of helplessness that requires the parent's day-to-day care in order to build the bond between parent and child. *See*, Goldstein, J.A., Freud, A. & Solnit, A.J., *Before the Best Interests of the Child*, 8 (1979). Three of the leading experts on child development have concluded that: "The younger the child, the greater is his need for [his parents]. When family integrity is broken or weakened by state intrusion, his needs are thwarted. . . . The effect on the child's developmental progress is invariably detrimental." *Id.* at 9.

[9] In fiscal year 2003-2004, there were approximately 520,000 children in foster care, nationwide. http://www.clasp.org/admin/site/publications/files/0317.pdf (Visited May 31, 2010). The cost of foster care was more than $23 billion, of which the United States government paid nearly 50 percent, with state and local governments paying the balance. *Id.* On September 30, 2008, approximately 463,000 children were in foster care nationwide. http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm (visited May 31, 2010).

type of immunity afforded to attorneys who handle the different types of proceedings.

C. The issue is important because allowing prosecutorial immunity to municipal attorneys in civil cases invites abuse.

The mere fact that an attorney happens to be a prosecutor does not mean that everything she does is entitled to absolute immunity. She is entitled to absolute immunity only when performing a prosecutorial function. For the rest of her actions, she is entitled to request qualified immunity only. For example, "Testifying about facts is the function of the witness, not of the lawyer. . . . Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness." *Kalina v. Fletcher*, 522 U.S. 118, 130-31 (1998). *Accord*, *Burns v. Reed*, 500 U.S. 478, 492-96 (1991) (prosecutor's provision of legal advice to the police during their pretrial investigation was protected only by qualified, rather than absolute, immunity); *Buckley v. Fitzsimmons*, 509 U.S. 259, 276-78 (1993) (prosecutor was not acting as an advocate either when he held a press conference or when he allegedly fabricated evidence concerning an unsolved crime). Even "the senior law enforcement official in the Nation – the Attorney General of the United States – is protected only by qualified, rather than absolute, immunity when engaged in the performance of national defense functions rather

than prosecutorial functions." *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997), *citing Mitchell v. Forsyth*, 472 U.S. 511 (1985). Moreover, recently, this Court granted certiorari in *Pottawattamie County, Iowa v. McGhee*, 129 S.Ct. 2002 (2009), to consider the issue of "[w]hether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's 'substantive due process' rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial," *Pottawattamie County v. Harrington*, 2009 WL 434751 *1 (2009),[10] *i.e.*, whether constitutional violations which the prosecutor commits in an investigatory function may be immunized when the prosecutor uses them in court. The instant case presents an analogous issue of whether a municipal civil attorney will be subjected to damages when she abandons her role as advocate for her client and takes on the role of client or complainant.

Even if a municipal civil attorney is entitled to absolute immunity when she carries out her client's instructions in a civil case, whether she is also entitled to absolute immunity when she disobeys her client's instructions, as respondents did in the instant case, remains an important question.

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[10] After oral argument, the writ was dismissed. *Pottawattamie County, Iowa v. McGhee*, 130 S.Ct. 1047 (Mem.) (2010).

It is a bedrock principle of civil law in the United States that the right to settle a lawsuit belongs to the client, not to the attorney. *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005) ("although the attorney can make tactical decisions without consulting the client, the plaintiff still must determine whether to settle or proceed to judgment. . . . [T]he attorney, as an agent, is obligated to act solely on behalf of, and for the exclusive benefit of, the client-principal, rather than for the benefit of the attorney or any other party. Restatement §§13, 39, 387. The attorney is an agent who is dutybound to act only in the interests of the principal. . . ."); *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 759-60 (2d Cir. 1946) ("it is well settled in this country that an attorney has no implied authority to compromise a claim"). Indeed, "it is axiomatic that the decision to settle a case rests with the client." *Pereira v. Sonia Holdings*, 91 F.3d 326, 329 (2d Cir. 1996); *accord, United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 986 F.2d 15, 19 (2d Cir. 1993); *Fennell v. TLB Kent Co.*, 865 F.2d 498, 501-02 (2d Cir. 1989); *Thomsen v. Terrace Navigation Corp.*, 490 F.2d 88, 89 (2d Cir. 1974); *see also*, ABA Model Rule 1.2: "A lawyer shall abide by a client's decision whether to settle a matter."

Conversely, if a lawyer settles a civil matter when the client has not authorized the settlement, the settlement is invalid. *Holker v. Parker*, 7 Cranch (11 U.S.) 436, 452-53 (1813). *See also, Lewis v.*

Gamage, 1 Pick. 347 (Mass. 1823); *Barrett v. Third Avenue R. Co.*, 45 N.Y. 628, 635 (1871); *Mandeville v. Reynolds*, 68 N.Y. 528, 540 (1877); *Kilmer v. Gallaher*, 112 Iowa 583, 84 N.W. 697 (1900). "Indeed, the utter want of power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed." *United States v. Beebe*, 180 U.S. 343, 351 (1901). A lawyer who refuses to settle a lawsuit and instead continues to litigate after the client has instructed counsel to settle may thus be said to have stepped out of the role of attorney and to have become the client.

Granting absolute immunity to municipal civil attorneys, while affording (at best) only qualified immunity to the municipal employees who serve as their clients, may encourage the employees to cede to their lawyers the basic question of whether or not to settle a case, thereby skewing the civil justice system, and "creating serious concerns . . . for the attorney-client relationship," because the client's ultimate control over the disposition of her claim is jeopardized. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 1635 (Apr. 21, 2010) (Kennedy, J., and Alito, J., dissenting.) This Court should decide whether a lawyer who refuses to settle a civil lawsuit and instead continues to litigate after the client has instructed the lawyer to settle has stepped out of the role of attorney and assumed the role of client and consequently has forfeited absolute immunity, similar to a prosecutor who forfeits her absolute prosecutorial immunity when she steps out of the role of attorney and into the role of complaining

witness, by swearing to the truth of facts in an application for a warrant. *See Kalina v. Fletcher*, 522 U.S. 118 (1998).

CONCLUSION

For all the aforementioned reasons, petitioner respectfully prays that the writ of certiorari be granted.

Dated: New York, New York
June 3, 2010

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: October 7, 2009 Decided: January 4, 2010

Docket No. 08-3069-cv (Lead), 08-3071-cv (Con)

----------X

SALLY CORNEJO, individually and
on behalf of her infant child Kevin Salas,

Plaintiff-Appellant,

– against –

WILLIAM BELL, individually and as Commissioner, KATHLEEN CERRITO, individually and as caseworker, JANICE HOGGS, individually and as supervisor, JOYCE DE NICHOLSON, individually and as manager, EUGENE WEIXEL, individually and as caseworker, RAMON VARGAS, individually and as supervisor, MAUREEN FLEMING, individually and as deputy director and City of New York, FREDDA MONN, individually and as supervising attorney, JODI KAPLAN, individually and as supervising attorney, DAWN SCHWARTZ, individually and as attorney SUSAN SCHENKEL SAVITT, and THE CITY OF NEW YORK,

Defendants-Appellees.

----------X

Before: MINER and CABRANES, *Circuit Judges*, and RAKOFF, *District Judge*.*

Appeal from the May 20, 2008 judgment of the United States District Court for the Eastern District of New York (Brian M. Cogan, *Judge*), granting summary judgment to defendants, in an action involving wrongful child removal, on the grounds of absolute immunity and qualified immunity under federal and state law. Although we disagree with the district court's conclusion that the caseworker defendants are entitled to absolute immunity under federal law, we agree that they are entitled to qualified immunity and that the rest of the district court's determinations are correct.

AFFIRMED.

CAROLYN A. KUBITSCHEK, Lansner & Kubitschek, New York, New York, *for Plaintiff-Appellant*.

JANET L. ZALEON, Of Counsel, City of New York Law Department, New York, New York (Michael A. Cardozo, Kristin M. Helmers, Jonathan L. Pines, City of New York Law Department, New York, New York, on the brief), *for Defendants-Appellees*.

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* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

RAKOFF, *District Judge*.

For centuries, Anglo-American law has protected public officials against claims for damages arising from actions taken in the course of duty. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). "As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Id.* In the case of legislators, judges, and certain executive officials such as prosecutors, the protection usually takes the form of absolute immunity from liability for damages. *Id.* at 807. In the case of most executive employees, however, the protection takes the form of "qualified immunity," *i.e.*, immunity from liability if the employee was acting in subjective and objective good faith. *Id.* at 807, 815. The instant case chiefly concerns what kind of immunity attaches to actions taken by two categories of New York employees -- caseworkers and lawyers – involved in the inherently difficult determination of whether to seek removal of a child from the custody of the child's parents on the ground of child abuse.

BACKGROUND

Plaintiff-appellant Sally Cornejo commenced these consolidated actions on behalf of herself and her infant child, Kevin Salas, alleging violations of federal and state law arising from actions taken by the employees of the New York City Administration for Children's Services ("ACS") in connection with the

investigation into the death of Cornejo's other infant son, Kenny, and the resulting Family Court proceedings. The defendants-appellees, in addition to the City of New York (named only derivatively), are current or former ACS caseworkers and supervisors (collectively, the "caseworker defendants"), namely, caseworkers Kathleen Cerrito and Eugene Weixel, their supervisors Janice Hogg and Ramon Vargas, Hogg's manager Joyce De Nicholson, De Nicholson's director Maureen Fleming, and the then-acting ACS Commissioner William Bell; and current or former lawyers in ACS's Division of Legal Services (collectively, the "lawyer defendants"), namely, attorneys Dawn Schwartz and Susan Schenkel Savitt, and their supervisors Fredda Monn and Jodi Kaplan.

The pertinent facts, largely undisputed and, where disputed, taken most favorably to the plaintiff, are as follows:

On October 30, 2002, plaintiff Cornejo returned from work to find her fiancé, Rothman Salas, holding their five-month-old son Kenny, who was not breathing. Kenny was subsequently brought to Schneider Children's Hospital ("Hospital") at 11:30 PM. On the afternoon of October 31, 2002, a nonphysician Hospital employee reported (via telephone call) to the New York State Central Registry of Child Abuse and Maltreatment (the "SCR") that Kenny had suffered a broken rib, diffuse cerebral edema, and a heart attack as a result of being violently shaken by his father. The Oral Report Transmittal ("ORT") documenting the call stated that Cornejo was not present during

the shaking incident. A second ORT made at approximately 5:30 PM stated that the rib fracture was several weeks old but that the parents had "failed to provide a plausible explanation" for how Kenny's rib was fractured.

Upon receiving the two ORTs from SCR, ACS assigned caseworker Cerrito to investigate. Cerrito spoke by telephone with Dr. Debra Esernio-Jenssen, a pediatric specialist in charge of the Hospital's Child Protection Consulting Team, who reported that Kenny's immediate brain and heart injuries were most likely caused by Shaken Baby Syndrome. She also expressed her belief that Cornejo had "no part" in the immediate injuries, which "would happen immediately after violent shaking." Dr. Esernio-Jenssen further opined, however, that the broken rib could have been the result of a prior shaking incident. Cerrito reported this back to Hogg, who concluded that not only Kenny but also Kevin, the couple's other, eighteen-month-old son, would have to be removed from the home pending further proceedings.

Cornejo was then informed that both her children would be removed from her custody until the ACS investigation was completed. Cerrito arranged for Kevin to be brought to the Hospital, where he was examined and then placed in temporary kinship foster care on an ex parte emergency basis. The medical examination of Kevin showed him to be healthy, with no signs of abuse. Kenny remained at the Hospital, where he died on November 7.

Meanwhile, on November 1, ACS instructed its attorneys to file petitions in Family Court accusing both parents of child abuse of both children. Kaplan filed the petitions, which were signed by Cerrito, that day. The petitions notably failed to differentiate between the two parents, Cornejo and Salas, stating that both parents had either "inflict[ed] or allow[ed] to be inflicted . . . physical injury" or "create[d] or allow[ed] to be created a substantial risk of physical injury" to the children. The petitions included the Hospital diagnosis of Shaken Baby Syndrome as the cause of Kenny's heart and brain injuries; as to the fractured rib, the petition alleged that the parents "failed to provide an explanation consistent with a non-abusive or non-intentional trauma." The Family Court remanded the children to ACS, and, as noted, Kenny died on November 7.

Despite an intervening attempt by Cornejo to regain custody of Kevin, this was where matters stood until, on November 14, a city medical examiner informed ACS attorney Schwartz of her preliminary findings: that she "could not say" that Kenny was a victim of Shaken Baby Syndrome and that the "fractured rib" was actually a congenital rib malformation. As a result, the very next day, ACS itself sought, by Order To Show Cause, to parole Kevin to his mother. Nevertheless, the Family Court judge, after hearing testimony from Dr. Esernio-Jenssen in which she maintained her conclusion that Kenny had been shaken, declined to return Kevin to his mother's care. The judge also denied subsequent applications for

parole or withdrawal of the petition against Cornejo, citing ongoing disparities in the medical evidence as to the cause of Kenny's death.

In January 2003, the medical examiner issued a final autopsy report that concluded that the actual cause of Kenny's death was a "rare and natural heart defect" and that reaffirmed the medical examiner's previous finding that there was no rib fracture but only a congenital abnormality. The Hospital staff, however, maintained its view that Kenny had been shaken.[1]

On February 4, ACS sought withdrawal of the petition against Cornejo, but the Family Court judge denied the request, making clear that she would not allow withdrawal of that petition unless ACS was also willing to withdraw the petition against Salas. Nevertheless, the judge did this time allow Kevin to be paroled to Cornejo's custody. On May 20, Cornejo moved for summary judgment and dismissal of the petition against her. At a court appearance on June 10, Schwartz stated that "ACS has no basis to dispute the [medical examiner's] findings," and the Family Court judge allowed both petitions to be withdrawn.

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[1] Kenny's heart was subsequently sent to two pediatric cardiologists for further evaluation. Neither specialist ultimately found a definitive cause for the heart attack, but they concluded that it was more likely that Kenny's death resulted from a congenital defect than from shaking.

Thereafter, on January 28, 2004, Cornejo commenced, on behalf of herself and her son Kevin, the first of the two civil rights proceedings now consolidated in this case, which, as now consolidated, allege due process and search and seizure violations under 42 U.S.C. § 1983, as well as state and federal claims for malicious prosecution (the latter again under § 1983) and a state law claim for breach of the duty of reasonable care. On May 19, 2008, the district court granted summary judgment to the defendants. *See Cornejo v. Bell*, No. CV-04-0341, 2008 WL 5743934 (E.D.N.Y. May 19, 2008). In addition to concluding that none of the plaintiff's rights was violated, the district court alternatively held that both sets of defendants were entitled to absolute immunity from all the § 1983 claims, and that, even failing this, they were entitled to qualified immunity. As to the malicious prosecution and breach of duty of reasonable care claims under New York state law, the district court concluded that the lawyer defendants were entitled to absolute immunity on both claims and that the caseworker defendants were entitled to absolute immunity as to the malicious prosecution claim and qualified immunity as to the unreasonable care claim.

DISCUSSION

We review *de novo* a district court's decision granting summary judgment. *See, e.g., Warren v. Keane*, 196 F.3d 330, 332 (2d Cir. 1999). Since we conclude that some form of immunity attaches to each of the challenged actions of each of the defendants

sufficient to preclude liability, we do not reach the district court's determination on the merits.

I. Federal Claims

The federal claims are all claims for damages brought under 42 U.S.C. § 1983, which provides "a method for vindicating federal rights elsewhere conferred," including under the Constitution. *Baker v. McCollan,* 443 U.S. 137, 144 n.3 (1979). The conduct at issue "must have been committed by a person acting under color of state law" and "must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Pitchell v. Callan,* 13 F.3d 545, 547 (2d Cir. 1994). There is no dispute here that the defendants were acting under the color of state law.

A. Absolute Immunity for Lawyer Defendants

As noted, the district court held, *inter alia,* that both the caseworker defendants and the lawyer defendants were entitled to absolute immunity precluding liability under § 1983. This was despite well-established precedent that "qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *DiBlasio v. Novello,* 344 F.3d 292, 296 (2d Cir. 2003) (quoting *Burns v. Reed,* 500 U.S. 478, 486-87 (1991)) (internal quotation mark omitted). However, there are certain instances where executive employees, such as

prosecutors, are entitled to absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). The real distinction between whether an executive employee is entitled to absolute or qualified immunity turns on the kind of function the employee is fulfilling in performing the acts complained of. This is what the Supreme Court has called a "functional" analysis. *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Prosecutors are entitled to absolute immunity, for example, because their prosecutorial activities are "intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force." *Imbler*, 424 U.S. at 430.

Mutatis mutandis, absolute immunity also extends to non-prosecutor officials when they are performing "functions analogous to those of a prosecutor." *Butz v. Economou*, 438 U.S. 478, 515 (1978). While any analogy between two kinds of executive employees is never perfect, such reasoning by analogy is at the heart of judicial thinking: things that are essentially alike should be treated essentially the same. Thus, the *Butz* Court held that an agency official who decides to institute an administrative proceeding is entitled in such circumstances to absolute immunity, since that decision is "very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." *Id.* at 515.

This Court has previously extended absolute immunity to state and federal officials initiating noncriminal proceedings such as administrative proceedings

and civil litigation. *See Barrett v. United States*, 798 F.2d 565, 572 (2d Cir. 1986) (citing *Butz*, 438 U.S. at 512-17). Of particular relevance here, we have held that an attorney for a county Department of Social Services who "initiates and prosecutes child protective orders and represents the interests of the Department and the County in Family Court" is entitled to absolute immunity. *Walden v. Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984). The *Wishengrad* Court concluded that given "the importance of the Department's [child protection] activities, the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims," the attorney must be accorded absolute immunity from § 1983 claims arising out of the performance of her duties. *Id.* We conclude that the lawyer defendants in the instant case were fulfilling similar functions, and that the district court thus properly extended to those defendants absolute immunity from the § 1983 claims.

B. Qualified Immunity for Caseworker Defendants

However, the district court was incorrect in its conclusion that the caseworker defendants were also entitled to absolute immunity.[2] Although they

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[2] The district court appears to have relied for its conclusion that the caseworker defendants were entitled to absolute immunity on a district court decision, *Levine v. County of Westchester*, 828 F. Supp. 238, 243-44 (S.D.N.Y. 1993), that was affirmed

(Continued on following page)

undoubtedly played a substantial role in providing the information that helped initiate many of the actions here complained of, the caseworker defendants essentially functioned much more like investigators than prosecutors. Even when they made the initial decision to remove Kevin from his mother's custody, their actions were the functional equivalent of police officers' making arrests in criminal cases, which are a classic example of actions entitled to qualified, rather than absolute immunity. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 340-44 (1986). The caseworker defendants here were performing what was "fundamentally a police function," *Robison v. Via*, 821 F.2d 913, 918 (2d Cir. 1987), and as such were entitled only to qualified immunity, *id.* at 920.

Even qualified immunity, however, is sufficient to shield executive employees from civil liability under § 1983 if either "(1) their conduct 'did not violate clearly established rights of which a reasonable person would have known,' or (2) 'it was objectively reasonable to believe that [their] acts did not violate these clearly established rights.'" *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998) (quoting *Soares v. Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993) (alteration in original) (internal quotation marks omitted)); *see also Harlow*, 457 U.S. at 818. Of relevance here, we have previously noted that the second

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without opinion by this Court. Such an affirmation has no precedential weight.

Young prong provides "substantial protection for caseworkers," *Tenenbaum v. Williams*, 193 F.3d 581, 596 (2d Cir. 1999), which is necessary because "[p]rotective services caseworkers [must] choose between difficult alternatives," *id.* (second alteration in original) (quoting *van Emrik v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 866 (2d Cir. 1990)). The *Tenenbaum* Court concluded that summary judgment should thus be "readily available to these caseworkers in proper cases under the qualified immunity doctrine." *Id.* at 597.

Here, the gist of plaintiff's § 1983 claims against the caseworker defendants for denial of due process and unlawful seizure in the immediate removal of Kevin from Cornejo's custody is that defendants had no reason to doubt her assertion that she was not at home when Kenny became ill on October 30, nor to infer that prior abuse had occurred, and so had no basis, even by inference, to remove Kevin and pursue Family Court actions against her. But undisputed facts establish that this is not a reasonable way to characterize the situation that confronted the caseworkers when they took their actions. Specifically, it is undisputed that at the time of Kevin's removal on October 31, ACS had received two ORTs reporting a medical opinion that Kenny had suffered violent shaking and a fractured rib. Although Salas, not Cornejo, was suspected of having shaken Kenny, the rib fracture was diagnosed as several weeks old. There was thus evidence of at least two instances of apparent abuse – one occurring at an unknown time

when Cornejo may have been present – for which neither parent had an apparent explanation. Moreover, a caseworker had confirmed the substance of the ORTs with Dr. Esernio-Jenssen, and the injuries to Kenny were extremely serious. Under these circumstances, it was objectively reasonable for the caseworker defendants to believe that immediate temporary removal of both children without prior judicial authorization was proper. *See id.* at 593. The caseworker defendants are thus entitled to qualified immunity on the due process and unlawful seizure claims arising from their initial removal of Kevin.

As for the subsequent actions taken in Family Court, these actions were chiefly taken by the lawyer defendants, who, as already determined, were entitled to absolute immunity. While certain of the caseworker defendants provided information to the Family Court, the heart of the complaint against them in this regard is that they failed to adequately apprise the Family Court of exculpatory information. But this Court has found no constitutional violation where caseworkers allegedly committed "sins of commission and omission in what they told and failed to tell . . . the Family Court Judge." *van Emrik*, 911 F.2d at 866. Indeed, it would take a much more extreme misstatement than any alleged here to override the necessary freedom of action that qualified immunity accords caseworker defendants dealing with the extreme situation when one child suffers fatal injuries while at home and another child is still at home. The caseworker defendants are thus entitled to qualified

immunity on the due process claims related to the Family Court actions.

II. State-Law Claims

Plaintiff also pursues malicious prosecution claims both under New York State law and, indirectly, under § 1983. Under New York law, a malicious prosecution claim requires: "(1) the initiation of an action by the defendant against the plaintiff, (2) begun with malice, (3) without probable cause to believe it can succeed, (4) that ends in failure or, in other words, terminates in favor of the plaintiff." *O'Brien v. Alexander*, 101 F.3d 1479, 1484 (2d Cir. 1996) (citing *Broughton v. State*, 335 N.E.2d 310, 314 (1975)). And § 1983, in recognizing a malicious prosecution claim when the prosecution depends on a violation of federal rights, adopts the law of the forum state so far as the elements of the claim for malicious prosecution are concerned. *See, e.g., Fulton v. Robinson*, 289 F.3d 188, 195 (2d Cir. 2002) ("In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment and establish the elements of a malicious prosecution claim under state law." (internal citations omitted)).

The issue of immunity, however, differs as between the state and federal law claims. As to the claim for malicious prosecution under § 1983, federal law of immunity applies, *see, e.g., Gross v. Rell*, 585 F.3d 72, 80 (2d Cir. 2009), and thus, since the

malicious prosecution claim is grounded on the same allegations as underlay the due process claims, the lawyer defendants are entitled to absolute immunity and the caseworker defendants to qualified immunity, either of which are sufficient to defeat the claim for the reasons already described in the preceding section. As to the state law claim of malicious prosecution, however, the highest New York court to consider the issue has previously determined that in a situation comparable to the instant case, both the caseworkers and the lawyers are entitled to absolute immunity. *See Carossia v. City of N.Y.*, 835 N.Y.S.2d 102 (App. Div. 1st Dep't 2007). Because we are bound "to apply the law as interpreted by New York's intermediate appellate courts . . . unless we find persuasive evidence that the New York Court of Appeals . . . would reach a different conclusion," we affirm the district court's ruling that all defendants here are entitled to absolute immunity on the state law claim of malicious prosecution. *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999).

Finally, as regards the breach of duty claim, New York law accords the lawyer defendants absolute immunity on such a claim, because their actions with regard to that claim "involve[d] the conscious exercise of discretion of a judicial or quasi-judicial nature." *Arteaga v. State*, 527 N.E.2d 1194, 1196 (N.Y. 1988). Caseworker defendants, by contrast, may be entitled only to qualified immunity on this claim. But qualified immunity is available under New York law if these defendants were "acting in discharge of their

duties and within the scope of their employment, and . . . such liability did not result from the willful misconduct or gross negligence." N.Y. Soc. Serv. Law § 419; *see also Yuan v. Rivera,* 48 F. Supp. 2d 335, 358 (S.D.N.Y. 1999). For the reasons previously discussed, the underlying facts establish that the caseworker defendants meet these requirements.

CONCLUSION

For the reasons stated, therefore, while we disagree with the district court's conclusion that the caseworker defendants were entitled to absolute immunity on plaintiff's claims under 42 U.S.C. § 1983, we find that they were nonetheless entitled to qualified immunity on those claims and that the rest of the district court's conclusions were correct.

In summary:

(1) The lawyer defendants are entitled to absolute immunity on plaintiff's § 1983 claims because they were performing functions analogous to those of a prosecutor. *See Wishengrad,* 745 F.2d at 152.

(2) The caseworker defendants are *not* entitled to absolute immunity on plaintiff's § 1983 claims because their actions were the functional equivalent of arresting officers in criminal cases.

(3) The caseworker defendants *are* entitled to qualified immunity on plaintiff's § 1983 claims because their actions were objectively reasonable

under the circumstances. *See Tenenbaum*, 193 F.3d at 595-96.

(4) For plaintiff's state-law malicious prosecution claims, all defendants are entitled to absolute immunity under New York law. *See Carossia*, 835 N.Y.S.2d at 104.

(5) For plaintiff's state-law breach of duty claims, the lawyer defendants are entitled to absolute immunity under New York law because their actions involved the conscious exercise of discretion of a judicial or quasi-judicial nature. *See Arteaga*, 527 N.E.2d at 1196. The caseworker defendants are entitled to qualified immunity under New York law because they did not commit willful misconduct or gross negligence. *See* N.Y. Soc. Serv. Law § 419.

Accordingly, the judgment of the district court dismissing the case in its entirety is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SALLY CORNEJO, individually and on behalf of her infant child KEVIN SALAS,	**MEMORANDUM DECISION AND ORDER**
Plaintiffs,	(Filed May 19, 2008)
– against –	CV-04-0341 (BMC) (SMG)
WILLIAM BELL, et al.,	CV-06-2910 (BMC) (SMG)
Defendants.	

SALLY CORNEJO, individually and on behalf of her infant child KEVIN SALAS,	
Plaintiffs,	
– against –	
FREDDA MONN, et al.,	
Defendants.	

COGAN, District Judge.

Sally Cornejo ("Cornejo" or "plaintiff"), on behalf of herself and her infant son, Kevin Salas, brought these actions against, in the first action, then Commissioner of the New York City Administration for Children's Services ("ACS") William Bell and current or former ACS employees Kathleen Cerrito, Janice Hogg, Joyce DeNicholson, Eugene Weixel, Ramon

Vargas, and Maureen Fleming, and in the second action, the City of New York (the "City") and current or former lawyers in ACS's Division of Legal Services ("DLS"), Fredda Monn, Jodi Appel-Kaplan (s/h/a Jodi Kaplan), and Dawn Shammas (s/h/a Dawn Schwartz) (collectively "lawyer defendants") (all defendants collectively "defendants"). These actions arise out of ACS's placement of Kevin in kinship foster care while an investigation was conducted into the death of plaintiff's other infant son, Kenny, and the ensuing Family Court process and proceedings. Plaintiffs assert the following ten causes of action against all defendants, and the eleventh against only the City and the lawyer defendants:

1. Liberty interest violation of 1st and 14th Amendments to the U.S. Constitution, based upon the removal of Kevin from both parents when only one posed a danger;

2. Inadequate training resulting in removal without adequate investigation, probable cause, or due process of law;

3. Unlawful interference with custody;

4. Unlawful imprisonment;

5. On behalf of infant plaintiff Kevin Salas: unlawful search and seizure (4th Amendment);

6. Malicious abuse of legal process – 4th and 14th Amendments – using legal process for wrongful purpose, when defendants

knew or should have known that Cornejo could not have been responsible for Kenny's condition;

7. Abuse of Process – 4th and 14th Amendments;

8. Malicious Prosecution – 4th and 14th Amendments – for commencing and continuing charges;

9. State law claim of malicious prosecution;

10. State law claim: violation of breach of reasonable care toward plaintiffs; and

11. (In the second action only) Brady violation: failure to produce exculpatory information.

The actions are before me on defendants' motions for summary judgment. The motions are granted.

BACKGROUND

On October 30, 2002, Cornejo was living with her fiancé, Rothman Salas, and their two children, Kevin and Kenny, in Queens, New York. At 8:00 a.m. that day, Cornejo's babysitter arrived to take care of the children while Cornejo and Salas were at work. Cornejo was at her job at Brooks Brothers that day from the morning until 5:00 p.m. Salas arrived home to relieve the babysitter at approximately 4:30 p.m. Cornejo arrived home at approximately 6:00 p.m. to find Salas holding their six-month old son Kenny, who was not breathing. Salas attempted to revive

Kenny by performing CPR, but he was unsuccessful. An ambulance was called and Kenny was taken to St. John's Queens Hospital. Cornejo arranged for her sister to get Kevin, then eighteen-months old, and take him to their aunt and uncle's home in New Jersey. St John's stabilized Kenny for transport and transferred him to Schneider Children's Hospital (the "Hospital") where he was admitted at 11:30 p.m.

At 2:21 p.m. the next day, October 31, a non-physician from the Hospital called the New York State Central Registry of Child Abuse and Maltreatment (the "SCR") – the state's child abuse hotline – reporting that "[o]n 10/30/02, father violently shook 5 month old (Kenny). As a result, child sustained a broken rib, diffuse cerebral edema (swelling inside the skull) and a heart attack. Child sustained severe brain damage as a result of having the heart attack. There were no prior abnormalities with child's health. Mother was not present during the incident. Unknown as to role of 18 month old (Kevin)." Three hours later, a second report was made to the SCR, which stated that "on 10/31/02, Ms. Cornejo (mother) and Ms. [sic] Salas (father) failed to provide a plausible explanation of how Kenny (5 months) suffered a left 5th rib, costovertebral junction fracture. The fracture is several weeks old." In the follow-up written reports that the Hospital was required to submit to the SCR, Cornejo is listed under "Role" as "NR", meaning "no role."

On October 31, 2002, the New York City Administration for Children's Services ("ACS" or "Agency")

Division of Child Protection ("DCP") received the two reports, called Oral Report Transmittals ("ORTs"), from the SCR, the first reporting that Kenny had been admitted to the Hospital with life-threatening injuries that appeared to have been caused by extremely violent shaking, and the second reporting that the infant also appeared to have a several-weeks-old rib fracture.

Pursuant to ACS's statutory obligation to investigate such reports, DCP promptly assigned defendant caseworker Cerrito to investigate the facts underlying the ORTs. Cerrito spoke to her supervisor Hogg and/or Hogg's supervisor, Child Protective Manager DeNicholson, prior to going to the Hospital to begin her investigation of the case. She was instructed to determine what occurred and report back to her supervisors.

Cerrito then spoke for approximately thirty minutes by telephone with Dr. Debra Esernio-Jenssen, a pediatric specialist at the Hospital in charge of the Hospital's Child Protection Consulting Team. According to Dr. Esernio-Jenssen, the injuries presented by Kenny were inflicted, not naturally occurring, and the explanation given by Salas – that the baby had suddenly gone stiff after Salas "smack[ed] his back" to burp him – was not consistent with the severity of the injuries exhibited by the child, who arrived in the emergency room "pulseless, not breathing, and cold." Dr. Esernio-Jenssen informed Cerrito that Kenny's injuries were "most likely" caused by Shaken Baby Syndrome, and that the broken rib could have been

broken by a prior shaking episode. Dr. Esernio-Jenssen also stated that "she believes mother and babysitter have no part in child's injuries. The symptoms that the father stated child exhibited would happen immediately after violent shaking."

Cerrito also interviewed Cornejo, who told her that during the timeframe within which the doctors surmised Kenny's injuries had occurred, she was at her job at Brooks Brothers. Cerrito did not interview Salas because he was taken to the police precinct by NYPD Special Victims Detective Peter Martinez. Salas told Det. Martinez that Cornejo had not yet returned from work when Kenny stopped breathing. After he was interviewed, Salas was released and Cornejo did not hear from him again for several years.

Thus, as of that night – October 31 – Cerrito was confronted with a gravely injured child suspected by a pediatric specialist to be the victim of Shaken Baby Syndrome at the hands of the child's father, and also having sustained a recently broken rib; and with two parents who reported having no information about what caused, or who was responsible for, the child's current life-threatening injuries, or prior broken rib.

Cerrito conveyed this information to Hogg, and was told that Cornejo's other infant son, Kevin, would have to be removed. After consultation with Hogg and/or DeNicholson, Cerrito informed Cornejo that due to the severity of Kenny's injuries, both her children were being taken away until ACS completed its investigation. Cerrito arranged to have Kevin

brought in for an examination at the Hospital, removed from his parents' custody, and placed, on an ex parte emergency basis, in temporary kinship foster care with relatives in New York City, pursuant to § 1024 of the Family Court Act. Cornejo was permitted unlimited visits with Kevin at her relatives' house, supervised by her relatives. Kenny remained in the Hospital until he died on November 7.

On November 1, ACS requested that the DLS attorneys file abuse petitions – one for each child – in Family Court, pursuant to Article 10 of the Family Court Act, on behalf of the two infants, naming both parents as respondents. DLS attorney Kaplan filed the petitions, signed by Cerrito, later that day. The petitions named both Salas and Cornejo and stated that they "are the persons responsible for the abuse and neglect of the child," and "inflict[ed] or allow[ed] to be inflicted . . . physical injury" or "create[d] or allow[ed] to be created a substantial risk of physical injury." The petitions also stated that the Hospital had reached a diagnosis of Shaken Baby Syndrome and a fractured rib, and that Salas and Cornejo "have failed to provide an explanation consistent with a non-abusive or non-intentional trauma that would explain the subject child's symptoms and diagnosis." The petitions did not mention Cerrito's or Dr. Esernio-Jenssen's belief that Cornejo did not cause Kenny's injuries.

At the first appearance in Family Court on November 1, Cerrito presented the facts of the case, including accurately relating Cornejo's assertion that

she was traveling home from work at the time Kenny suffered his injuries. Kaplan added that "that's the story that had been given to us. [ACS] is investigating to find out more details." Upon defendants' request, the Family Court remanded the children to ACS, finding "that there's injuries to one child and imminent danger to the life or health of each of these children." The court adjourned the matter to November 6. On November 6, Cornejo appeared before Family Court Judge Rhea Friedman – the judge assigned the case after the initial November 1 appearance – and was assigned court-appointed counsel, who requested a hearing challenging the remand, pursuant to Family Court Act § 1028. Judge Friedman set the § 1028 hearing for November 14.

After filing the petition on November 1, ACS continued its investigation of the case. That same day, ACS conducted a Safety Assessment in which it noted as a mitigating circumstance that "mother was not at home at the time of Kenny's injury." On November 4, DeNicholson spoke with Kevin and Kenny's babysitter, and she confirmed that she had been caring for the children on October 30 while their parents were at work from 8:00 a.m. until Salas came home at 4:30 p.m. On November 8, Cerrito spoke to the assistant district attorney assigned to the case, who informed Cerrito that she had been working all week on the case and that she did not think that Cornejo did anything wrong. On or about November 12, Cerrito obtained a copy of Cornejo's timecard at Brooks Brothers and thereafter received direct confirmation

from Brooks Brothers that Cornejo had worked on October 30 - the date of the incident – until 5:00 p.m. On November 13, Cornejo delivered a copy of her time-card from Brooks Brothers to Cerrito.

In addition, DLS attorney Kaplan spoke with Det. Martinez who had spoken with both Cornejo and Salas at length. Kaplan also viewed a videotape of Salas's interview. Based upon the timeframe provided by Salas, corroborated by Brooks Brothers' records; Salas's description of Cornejo as "hysterical" seeing the unconscious Kenny in Salas's arms; and Det. Martinez's observations, in the course of his investigation of the Cornejo/Salas apartment; Kaplan concluded, on behalf of ACS, that it was now "clear that the respondent mother was not at the case address when the trauma was inflicted on the child Kenny."

On November 14, the city medical examiner (the "ME") assigned to the case informed DLS attorney Schwartz that, although her autopsy report for Kenny was not yet final, she found that Kenny's previously diagnosed fractured rib was actually a congenital malformation of the rib. In addition, the ME told Schwartz that she could not say that Kenny had been a victim of Shaken Baby Syndrome. However, Dr. Esernio-Jenssen had not changed her view that the injuries Kenny sustained on October 30 were most likely caused by Shaken Baby Syndrome. The lawyer defendants never sought to amend the petition to reflect that Kenny never had a rib fracture.

Sometime during the first two or three weeks of November, DeNicholson instructed the DLS attorneys to withdraw the petition against Cornejo because the investigation had shown that Cornejo was not at home on Oct. 30 when Kenny suffered his injuries. On November 15, ACS sought parole, *i.e.*, return, of Kevin to Cornejo by Order to Show Cause ("OSC"). The OSC was heard by the Family Court on November 19. At the hearing, ACS produced Dr. Esernio-Jenssen to support ACS' motion for return of the child to his mother, using her testimony to establish the timeframe of the incident and to explain, based upon the recently corroborated facts regarding Cornejo's time of departure from work and arrival home, why it was not possible that she was present at that time. Dr. Esernio-Jenssen also testified to her medical findings and conclusions regarding the injuries resulting in Kenny's death, including her conclusion that Kenny was the victim of violent shaking. The OSC itself disclosed the fact that Kenny had not suffered a fractured rib. In arguing in favor of returning Kevin to Cornejo, Kaplan or DLS attorney Shammas recounted the likely time of injury, Cornejo's time of departure from work, Cornejo's reaction upon first seeing her unconscious son, and the consistency of Cornejo's account of her actions and whereabouts on the date of the incident. Kaplan further explained to Judge Friedman that Cornejo had ended her relationship with Salas, and that "she's been extremely cooperative." At the conclusion of testimony of November 19, Judge Friedman declined to parole Kevin to his mother.

On December 9, ACS conducted a Safety Assessment in which they determined the "[c]hildren were exclusively in the care of their father when Kenny was injured. Mother was at work at the time of incident." The parties appeared before the Family Court again on ACS's OSC on December 11, at which time Judge Friedman denied the application to parole Kevin to Cornejo, stating "what I perceive is the overall-discrepancy in this case, and I'll tell you what it is: if medical doctors are credited by ACS, and the ones you are relying on, are so certain that the Mother had nothing to do with this, I do not understand why she is a Respondent; why you do not withdraw the Petition against her. You seem to be having it both ways – want to have it both ways." Judge Friedman thus accused ACS of being duplicitous in its application for parole to Cornejo but not withdrawal of the petition as against her.

Later in that same December 11 hearing, Kaplan did seek to withdraw the petition against Cornejo but initially made it contingent on Cornejo submitting to ACS supervision. Judge Friedman responded that she could not issue such an order absent a petition. Kaplan replied that the petition would remain as to the father and the order could be based on that. Judge Friedman appeared to accept that explanation, but noted what she perceived to be significant disparities in the medical records. Judge Friedman explained "you've made a determination that your position is that you want to withdraw the petition, and I believe as in any civil proceeding, it is with the Court's

permission that you withdraw against the respondent, and there is very old case law that to the extent that there should be a hearing on that, but the core issue is the medical testimony." She then offered the following explanation for not granting even parole, while not reaching the application to withdraw the petition as against Cornejo: "[t]here's a child who died, okay? . . . I am not comfortable entertaining an application for an outright parole to the mother without resolving in my mind what I think is the core issue the medical evidence."

On January 22, the ME's office issued a final signed autopsy report, in which the ME found that the cause of Kenny's death was not Shaken Baby Syndrome but a rare and natural heart defect. The ME's report also noted that the initially diagnosed rib fracture was indeed a congenital bone abnormality. DeNicholson thereafter instructed Kaplan, Schwartz, and Monn to withdraw the petitions against both Cornejo and Mr. Salas.

A meeting was convened on January 29 that included staff from the ME's office, Hospital staff, the Queens County DA's office, DLS staff, Cornejo's attorney and the law guardian representing Kevin. Throughout the meeting, the teams of medical personnel from the Hospital and the ME's office continued to hold firm to their divergent beliefs as to whether Salas had abused Kenny on October 30. The Hospital staff requested that a pediatric cardiologist look at the heart and the ME's office agreed.

At the next court date, February 4, ACS again requested a withdrawal of the petition, and again Judge Friedman denied ACS's request, but did permit the parole of Kevin to Cornejo. In subsequent hearings, Judge Friedman made clear that she would not permit the withdrawal of the case against Cornejo unless ACS was willing to withdraw the petition against Salas, even though medical staff at the Hospital and the ME's office remained divided as to whether Kenny was the victim of lethal abuse caused by Salas.

On February 7, ACS conducted a Safety Assessment of Kevin, and the report of that assessment listed all of the allegations against Cornejo and Salas, stated that they were unsubstantiated, and explained why. It concluded that the cause of death was natural and not Shaken Baby Syndrome.

On March 6, the attorney defendants informed the Family Court that they were waiting for an assessment from a pediatric specialist to resolve the disagreement between the Hospital and the ME as to whether Kenny had died from natural causes. On April 28, Kaplan informed the Family Court that, while the pediatric specialist was reviewing the case, ACS was retaining another pediatric specialist. Eventually, both specialists were unable to find a cause for the heart attack, but concluded that it was more likely that the child had died from the heart attack than from violent shaking.

By OSC signed May 20, Cornejo moved for summary judgment and dismissal of the petition against

her. In a support affirmation, Cornejo's attorney noted, among other things, ACS's applications for parole of Kevin to Cornejo on November 15, 2002, and the Family Court's denial of that application; Dr. Esernio-Jenssen's testimony on November 19, put forward by defendants, exonerating Cornejo of responsibility for Kenny's injuries; ACS's application on December 11 to withdraw the petition as against Cornejo, and the court's denial of that motion; and Cornejo's own application to have Kevin paroled to her, and the court's denial of that application.

At a June 10, 2003, court appearance, Schwartz notified the court that "ACS has no basis to dispute the findings of the [ME], and does not believe that any evidence exists which would prove this petition by a preponderance of the evidence." Judge Friedman then held that she was allowing the petition to be withdrawn as to both Cornejo and Salas. She acknowledged that "[t]his was an enormously complicated case" and explained the delay in concluding the proceeding as follows:

> I think that when I declined immediately to permit the petition to be withdrawn I was certainly making – trying to make as certain as possible that the tragedy that befell this baby was of natural origin and not through an act of basically abuse or trauma . . . I feel for the mother in any extra distress prolonging Court proceedings may have had on her, but the reason I did that was to ensure that the surviving child was safe and healthy. . . .

On January 28, 2004, plaintiffs then commenced the first of the two civil rights proceedings now before this Court.

DISCUSSION

I. Standard for Summary Judgment

Under Federal Rule of Civil Procedure 56(c), a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004) (quotation omitted); *see Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510 (summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); *Rivkin v. Century 21 Teran Realty LLC*, 494 F.3d 99 (2d Cir. 2007). For this reason, "if 'there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor

may be drawn, the moving party simply cannot obtain a summary judgment.'" *Binder & Binder PC v. Barnhart*, 481 F.3d 141, 148 (2d Cir. 2007) (quoting *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 59 (2d Cir. 1997)) (alteration in original).

II. Claims Under 42 U.S.C. § 1983

Plaintiffs seek damages on their federal claims pursuant to 42 U.S.C. § 1983, which "is not itself a source of substantive rights," but provides "a method for vindicating federal rights elsewhere conferred," such as in the Constitution. *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S.Ct. 2689, 2694 n.3 (1979). In order to maintain an action pursuant to 42 U.S.C. § 1983, a plaintiff must allege two essential elements. First, "the conduct complained of must have been committed by a person acting under color of state law." *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir. 1994) (citing *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981)). Second, "the conduct complained of must have deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Id.*

There is no dispute here that the conduct of which plaintiffs complain was committed by persons acting under color of state law. Defendants, instead argue that they have not violated plaintiffs' constitutional rights and even if they did, they are protected by qualified and absolute immunity. Plaintiffs contend that defendants violated their due process rights,

right to be free from an unreasonable seizure, and right to be free from malicious prosecution; are not entitled to the affirmative defenses of qualified or absolute immunity; and the City or ACS had a municipal policy, practice, or custom that caused the violations of plaintiffs' rights.

A. Constitutional Violations

1 Due Process Violations

(a.) Cornejo claims that Kevin's removal from her care without her consent and without court authorization deprived her of her liberty interest in the care, management, and custody of Kevin, and deprived Kevin of his reciprocal interest in being cared for by his mother, without due process of law.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." "Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as 'of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 564 (1996) (internal citation omitted). Parents therefore have a constitutionally protected liberty interest in the care, custody and management of their children. *See Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982).

"As a general rule, therefore, before parents may be deprived of the care, custody or management of their children without their consent, due process – ordinarily a court proceeding resulting in an order permitting removal – must be accorded to them." *Tenenbaum v. Williams,* 193 F.3d 581, 593 (2d Cir. 1999) (citing *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208 (1972); *Hurlman v. Rice,* 927 F.2d 74, 79 (2d Cir. 1991) (such due process is "generally in the form of a predeprivation hearing"); *Robison v. Via,* 821 F.2d 913, 921 (2d Cir. 1987) (due process "would generally require a predeprivation hearing")).

However, the Supreme Court has stated that "[d]ue process . . . is a flexible concept that varies with the particular situation." *Zinermon v. Burch,* 494 U.S. 113, 127, 110 S.Ct. 975, 984 (1990). The Court further defined the factors that must be weighed to determine "what procedural protections the Constitution requires in a particular case:"

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)). "The law thus seeks to

strike a balance among the rights and interests of parents, children, and the State." *Tenenbaum*, 193 F.3d at 594 (citing *Hollingsworth v. Hill*, 110 F.3d 733 (10th Cir. 1997); *Robison*, 821 F.2d 913).

Here, the "[s]tate [has a] profound interest in the welfare of the child, particularly his or her being sheltered from abuse." *Id.* at 593-94. Therefore, in "emergency circumstances," "officials may temporarily deprive a parent of custody [sic] a child" without court authorization or parental consent. *Robison*, 821 F.2d at 921. Emergency circumstances mean circumstances where "the child is immediately threatened with harm, . . . where the child is left bereft of care and supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence." *Hurlman*, 927 F.2d at 80. "'The mere "possibility" of danger' is not enough, [for][i]f it were, officers would always be justified in seizing a child without a court order whenever there was suspicion that the child might have been abused." *Tenenbaum*, 193 F.3d at 594 (quoting *Hurlman*, 927 F.2d at 80, 81). "If the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, ex parte or otherwise, for the child's removal, then the circumstances are not emergent. The government must offer 'objectively reasonable' evidence that harm is imminent." *Nicholson v. Scoppetta*, 344 F.3d 154, 171 (2d Cir. 2003). Thus, "[i]f at any time [Kevin] should have been removed for his protection and there was not then reasonably sufficient time to

seek predeprivation judicial authorization, there would have been, as a matter of law, no violation of [Cornejo's or Kevin's] due-process rights." *Id.* at 595.

New York State has established a *res ipsa loquitur* approach to certain types of child abuse, designating certain types of injuries as prima facie evidence of abuse or neglect. Under N.Y. Jud. L. (Family Court Act) § 1046(a)(ii):

> [P]roof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible.

"Whiplash shaken baby syndrome . . . has been held to be such an injury, constituting prima facie evidence of abuse." *Dietz v. Damas*, 932 F.Supp. 431, 447 (E.D.N.Y. 1996) (citing *In re Antoine J.*, 185 A.D.2d 925, 926, 587 N.Y.S.2d 13, 14 (2d Dep't 1992) (proof of whiplash shaken baby syndrome was sufficient to establish that an infant had been abused because "in view of the failure of the mother to offer any reasonable explanation for the physical injuries of [the infant and his brother] we are satisfied that findings of abuse and neglect were established upon a preponderance of credible evidence.")).

In *Tenebaum*, the Second Circuit found a due process violation because a jury could have concluded that there never came a time when the child should have been removed for her protection when there was not reasonably sufficient time to seek judicial authorization:

> The decision to remove [the child] from school was made as early as Monday. . . . She was not taken from school until Tuesday at noon. Defendants concede that a court order could have been obtained in one day. The evidence suggests that the purpose of removing [the child] from school was not to sweep her out of harm's way but rather "to rule out [the possibility that [she] had been] sexual[ly] abuse[d]."

193 F.3d at 595.

In contrast, in *Gottlieb v. County of Orange*, 84 F.3d 511, 520 (2d Cir. 1996), the Second Circuit found that "a rational juror could not fail to conclude that defendants had an objectively reasonable basis for believing that the prompt separation of [the father] from [the daughter], without pausing to obtain a court order, was necessary." There, a "[s]ource had reported ongoing sexual abuse of [the daughter]; [the daughter] herself described repeated molestations by [her father]; and [the daughter] said that [the father] did not like 'tattletales' and that she expected to be punished if she spoke of those matters outside of the home. Accordingly, no pre-separation hearing was required." *Id.*

Here, the facts are closer to those that were presented in *Gottlieb*. ACS first became involved when it received reports from the state's child abuse hotline concerning Kenny on October 31, and the decision to remove Kevin and the effectuation of removal occurred before the day was out. Kevin was staying with relatives in New Jersey at the time of removal, but without a removal there was nothing to prevent Cornejo and Salas from picking Kevin back up from the relatives that very night. There is no evidence in the record of how long it would have taken to obtain a court order, other than evidence that the court had closed for the day at the time the decision to remove was made. ACS was confronted with a gravely injured child suspected by a pediatric specialist to be the victim of Shaken Baby Syndrome, constituting prima facie evidence of abuse, at the hands of the child's father, and also as having recently sustained a broken rib; and with two parents who reported having no information about what caused, or who was responsible for, the child's current life-threatening injuries or prior broken rib. ACS could not have reasonably returned Kevin to that environment without putting him at risk of imminent danger.

Based on these facts and the others recited above, no rational jury could find, without impermissibly speculating, that at the time ACS removed Kevin, there was time, entirely consistent with Kevin's safety, to seek a court order.

(b.) Plaintiffs' also allege that defendants violated plaintiffs' due process rights by misrepresenting

facts to obtain a court order. "The right to a fair tribunal includes the right to a proceeding free of perjury by state officials . . . [and][t]he introduction of false evidence [in] violation[ ][of] the due process clause." *Yuan v. Rivera*, 48 F.Supp.2d 335, 346 (S.D.N.Y. 1999) (internal quotation omitted).

In support of their claim, plaintiffs point to *Yuan*, in which the district court found that the plaintiff's due process claim withstood summary judgment based on allegations that a caseworker committed perjury in pursuing a child abuse and neglect petition against the plaintiff. There, the caseworker signed a petition alleging that plaintiff abused her son when the caseworker knew that plaintiff was not at home when any of the injuries were believed to have occurred; testified that the plaintiff's other son had been abused when she knew that he had not; and falsely stated that she had informed the plaintiff that her husband had abused their son prior to the plaintiff leaving her other son in her husband's care.

Defendants urge the court to follow *van Emrik v. Chemung County Dep't of Soc. Serv.*, 911 F.2d 863 (2d Cir. 1990), in which the Second Circuit addressed claims of constitutional violations arising out of similar circumstances. There, plaintiffs-appellants:

> [A]ccuse[d] the caseworkers of sins of commission and omission in what they told and failed to tell the parents and the Family Court Judge. For example, they point out that the Judge was not told that the reason why the parents had no explanation for the

> injury was because it occurred, according to their version, while the child was alone with the baby-sitter.

Id. at 866. The Second Circuit found that "[t]hough it would have been more candid to have made the Judge aware of this circumstance, neither this omission nor appellants' other criticisms of the papers submitted to the Family Court Judge rise to the level of a constitutional violation." *Id.*

Here, following Kevin's emergency removal on October 31, ACS requested that DLS file child abuse petitions (one for each child), and DLS did so on November 1. Cerrito signed the petitions under oath and in doing so, plaintiffs allege, Cerrito perjured herself. Plaintiffs note that although the petitions accuse Cornejo of abusing both children, Cerrito did not believe, and had no evidence, that Cornejo had abused either child. Plaintiffs also allege that Cerrito swore falsely that Cornejo had no explanation for Kenny's injuries when in fact Cornejo had provided an alibi.

In fact, the contents of the petitions do not diverge as starkly from the then-known facts as plaintiffs contend. The petitions named both Salas and Cornejo and stated that they "are the persons responsible for the abuse and neglect of the child," and "inflict[ed] or allow[ed] to be inflicted . . . physical injury" or "create[d] or allow[ed] to be created a substantial risk of physical injury." The petitions also stated that Salas and Cornejo "have failed to provide

an explanation consistent with a non-abusive or non-intentional trauma that would explain the subject child's symptoms and diagnosis." The petitions did not state that Cornejo herself inflicted physical abuse on Kenny, and Cornejo's alibi was not an explanation of how Kenny suffered his injuries that would make the statement in the petition false. At that time, the evidence indicated that Cornejo was not at home when Kenny sustained injuries that appeared to be Shaken Baby Syndrome, but there was no innocent explanation for how Kenny sustained his injuries and no evidence or explanation for what was then diagnosed as a several-weeks-old broken rib. Although Cerrito later testified that she did not personally think that Cornejo had abused Kenny and that Dr. Esernio-Jenssen thought that she had not, she qualified that by testifying that "we couldn't prove that."

Plaintiffs further allege that Cerrito misled the court by failing to note Dr. Esernio-Jenssen's assessment that Cornejo could not have been responsible for Kenny's condition and failing to inform the court that other witnesses confirmed that Cornejo was at work when Kenny may have been shaken. Again, plaintiffs' allegation overstates matters. Although the petitions did not include this information, at the appearance in Family Court the day the petitions were filed, Cerrito accurately related to the court Cornejo's assertion that she was traveling home from work at the time Kenny suffered his injuries.

Finally, Plaintiffs allege that Cornejo swore falsely to the Family Court that the Hospital had reached

a diagnosis of Shaken Baby Syndrome and a fractured rib. The petitions did indeed state that the Hospital had reached a diagnosis of Shaken Baby Syndrome and a fractured rib, even though Dr. Esernio-Jenssen had actually informed Cerrito that Kenny's injuries were only "most likely" caused by Shaken Baby Syndrome and that the broken rib could have been broken by a prior shaking episode. Thus, the petitions did not include the qualifiers that Dr. Esernio-Jenssen had placed on her initial diagnosis.

Even viewing this evidence in the light most favorable to plaintiffs, it does not support their allegations and a jury could not reasonably conclude that Cerrito provided false testimony to the Family Court. Unlike in *Yuan*, the evidence here does not indicate that Cerrito fabricated conversations or abuse of the sibling of the abused child, but rather indicates that more accurate information could have been provided but was not. I find that the circumstances here are closer to those briefly described by the Second Circuit in *van Emrick*. As the Court found there, the statements provided to the Family Court here could have been more accurate but these failings do not rise to a deprivation of due process.

2. Unlawful Seizure

Plaintiffs assert that Kevin's removal violated his right to be free from unlawful seizure under the Fourth Amendment because ACS did not have a court order authorizing Kevin's removal and emergency

circumstances did not exist at the time Kevin was removed.

The Fourth Amendment analysis results in a test for present purposes similar to the due process standard. *Tenenbaum*, 193 F.3d 581. "If the information possessed by [the caseworkers] would have warranted a person of reasonable caution in the belief that [Kevin] was subject to the danger of abuse if not removed from [Cornejo's care] before court authorization could reasonable have been obtained, her removal was reasonable also." *Id.* at 604. For the reasons stated above – Kenny had serious injuries consistent with multiple instances of child abuse, his parents had no explanation for the injuries, and the court was closed for the day when ACS obtained this information – a rational jury could not find that when ACS removed Kevin there was reasonably sufficient time to seek a court order without subjecting Kevin to the danger of abuse.

3. Malicious Prosecution

Malicious prosecution is a common law tort which can state a claim under § 1983 if it implicates a plaintiff's constitutional or federal statutory rights, as is alleged here. *Lennon v. Miller*, 66 F.3d 416 (2d Cir. 1995). Malicious prosecution claims are generally limited to criminal actions, but a § 1983 malicious prosecution claim in a civil proceeding can be sustained if there is "a seizure or other perversion of proper legal procedures implicating the claimant's

personal liberty and privacy interests under the Fourth Amendment." *Washington v. County of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004). Here, the removal of Cornejo's son is sufficient to meet that threshold. *See Providencia v. Schutlze*, No. 02 Civ. 9616, 2007 WL 1582996 (S.D.N.Y. May 31, 2007).

The elements of a § 1983 malicious prosecution claim are taken from the law of the forum state. *Russell v. Smith*, 68 F.3d 33 (2d Cir. 1995). In New York, a cause of action for malicious prosecution has four elements: "(1) the initiation of an action by the defendant against the plaintiff, (2) begun with malice, (3) without probable cause to believe it can succeed, (4) that ... terminates in the plaintiff's favor." *O'Brien v. Alexander*, 101 F.3d 1479, 1484 (2d Cir. 1996) (citing *Broughton v. State*, 37 N.Y.2d 451, 373 N.Y.S.2d 87 (1975)).

There is no dispute that defendants commenced a Family Court proceeding against Cornejo which ended in Cornejo's favor. Plaintiffs contend that there is a factual issue as to whether sufficient probable cause existed to bring an action to remove Kevin and whether the decision to bring that action was motivated by malice.

Probable cause exists, in the criminal context, if a police officer has "knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Weyant v. Okst*,

101 F.3d 845, 852 (2d Cir. 1996). The same standard applies here. *See Tenenbaum*, 193 F.3d. 81 (holding, under circumstances similar to those here, that the law of probable cause in the criminal context applied). Probable cause is "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 2329 1983). Although probable cause requires something more than a mere suspicion, it also requires a lesser showing than a prima facie case of culpable conduct. *Id* at 213, 103 S.Ct. 2317. Probable cause does not demand any showing that a good-faith belief be "correct[,] or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1542 (1983).

In addition, if the material facts are undisputed, the existence or non-existence of probable cause is a question of law, not of fact. *See Stewart v. Sonneborn*, 98 U.S. 187, 194, 25 L.Ed. 116 (1878) (whether facts alleged to show probable cause are true is a matter of fact, "but whether, supposing them to be true, they amount to a probable cause, is a question of law" (internal quotation marks omitted)). This means, in the context of a motion for summary judgment, that if a plaintiff's version of the facts demonstrates probable cause, then summary judgment in favor of the defendant is appropriate. *See Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007).

The same evidence which provided defendants with reason to remove Kevin prior to obtaining to a court order, discussed above, provided defendants with probable cause to bring the Family Court action.

It suffices to repeat that ACS removed Kevin the night of October 31 and brought the Family Court action the next day, and at both times ACS had the same information: the pediatric specialist who had examined Kenny believed he was a victim of Shaken Baby Syndrome at the hands of the child's father, the pediatric specialist believed Kenny had recently sustained a broken rib, and the parents reported having no information about who or what caused the child's current or prior injuries. And although ACS had information indicating that Cornejo was not at home at the time Kenny was injured on October 30, the same could not be said concerning the weeks old broken rib.

However, a malicious prosecution claim may survive summary judgment if "plaintiff can demonstrate that at some point subsequent to the arrest, additional facts came to light that negated probable cause." *Coyle v. Coyle*, 354 F.Supp.2d 207, 213 (E.D.N.Y. 2005) (quoting *Dukes v. City of N.Y.*, 879 F.Supp. 335, 342 (S.D.N.Y. 1995)). Here, plaintiff alleges changed circumstances sufficient to dissipate the existence of probable cause.

After filing the petition on November 1, 2002, ACS continued its investigation of the case. Over the two weeks that followed, ACS conducted a Safety Assessment which noted that Cornejo "was not at home at the time of Kenny's injury;" the ADA advised Cerrito that she did not think that Cornejo did anything wrong; Cerrito obtained Cornejo's time-card from Brooks Brothers confirming that Cornejo was

not at home at the time of the October 30 incident; and the ME informed attorney Schwartz that the suspected rib fracture was actually a birth defect and that she could not say that Kenny had been a victim of Shaken Baby Syndrome. Plaintiffs contend that, based on the investigation, DeNicholson instructed the DLS attorneys to withdraw the petition against Cornejo, sometime during the first two or three weeks of November.

In addition, an ACS Safety Assessment on December 9 found that Cornejo "was at work at the time of incident," and on January 22, the ME issued a final autopsy report finding that Kenny's death was not caused by Shaken Baby Syndrome but from a heart defect and that the suspected rib fracture was just a prowth abnormality. Plaintiffs' [sic] contend that DeNicholson then again instructed DLS lawyers to withdraw the petitions against Cornejo and, this time, Salas too. Viewed in the light most favorable to plaintiffs, these facts could give rise to a question of fact as to whether probable cause continued to exist in support of the petition against Cornejo as early as November 14, at the end of the first two weeks of the investigation.

But there is more. In response to this development, defendants promptly took action to avoid violation of plaintiffs' liberty interests. On November 15, defendants sought, by OSC, to parole Kevin to Cornejo; on November 19, defendants produced Dr. Esermo Jenssen to support their motion for parole; at the next hearing on that OSC, on Dec. 11, defendants

again sought parole and to withdraw the petition as to Cornejo; at the next hearing, Feb. 4, defendants again sought parole and to withdraw the petition as to Cornejo, at which point Kevin was paroled to Cornejo, and at the June 10 hearing, defendants again sought, and finally were granted, permission to withdraw the petition. Thus, a reasonable fact finder construing the evidentiary record in the light most favorable to plaintiffs could not find that defendants failed to seek the return of Kevin to Cornejo and the withdrawal of the petition against Cornejo, once probable cause dissipated. Thus, the malicious prosecution claim must be dismissed as a matter of law because no reasonable jury could find a constitutional violation.

Moreover, to succeed on a malicious prosecution claim, plaintiffs also must demonstrate that the proceeding was continued with malice. The Second Circuit noted in *Lowth v. Town of Cheektowaga*, 82 F.3d 563 (2d Cir. 1996), that lack of probable cause generally raises an inference of malice sufficient to withstand summary judgment, *see also Ricciuti v. N.Y. City Transit Auth.*, 124 F.3d 123, 131 (2d Cir. 1997) ("a jury could find that probable cause for the charges against the plaintiff[ ] was lacking . . . that finding alone would support an inference of malice"), but in the present case, the dissipation of probable cause is not sufficient to support an inference of malice. As the Second Circuit explained in *Lowth*:

> Under New York law, malice does not have to be actual spite or hatred, but means only

> "that the defendant must have commenced the criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served." *Nardelli v. Stamberg*, 44 N.Y.2d 500, 502-03, 377 N.E.2d 975, 976, 406 N.Y.S.2d 443, 445 (1978). In most cases, the lack of probable cause – while not dispositive – "tends to show that the accuser did not believe in the guilt of the accused, and malice may be inferred from the lack of probable cause." *Conkey v. State*, 74 A.D.2d 998, 999, 427 N.Y.S.2d 330, 332 (4th Dep't 1980).

82 F.3d at 573.

In *Lowth*, the police were investigating suspicious individuals seen near a home and the officer who eventually arrested plaintiff had been off duty and as a result responded in an unmarked car and dressed in plain clothes. The officer parked his car in front of the driveway, left his car running with the door open, and went behind the house. Plaintiff then arrived home, found the officer's unmarked car blocking the driveway, and got in the car and started to move it. Seeing this, the officer, who had just returned from behind the house, yelled out identifying himself and ordered plaintiff to stop, but she did not hear him. Running up to the car, the officer reached through the window and struck plaintiff while trying to stop the car. "Attacked by an unknown man, dressed as casually as [the officer] was, [plaintiff] panicked and accelerated. The car swerved onto a neighbor's lawn next to the driveway and moved forward with [the

officer] hanging half in and half out of the window" before coming to a stop. The officer then pulled plaintiff – who was shouting for the police – out of the car and informed her he was the police, at which point she stopped resisting and the officer arrested her.

The Circuit reversed the district court's dismissal on summary judgment of malicious prosecution, ruling, among other things, that because the arresting officer "lacked probable cause to charge [plaintiff] with resisting arrest," and because "it is certainly not implausible that [the arresting officer] might have been acting out of anger for what [plaintiff] had put him through, we think that enough evidence of malice ... can be inferred to survive a motion for summary judgment."

Quite to the contrary, here defendants initially had probable cause to "charge" Cornejo and when that probable cause dissipated defendants actually took actions to return Cornejo's child and end the proceeding against her. These are the actions indicative of someone with a desire only "to see the ends of justice served;" they infer nothing untoward. Thus, the facts here are not such that the lack of probable cause could support a finding of malice.

4. Qualified Immunity

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982), the Supreme Court held that a government official is entitled to qualified immunity if

(1) the plaintiff fails to allege a violation of a federal right; (2) the right alleged was not clearly established at the time of the violation; or (3) the defendant's actions were objectively reasonable in light of the legal rules that were established at the time they were taken. *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 211-12 (2d Cir. 2003).

Thus, qualified immunity generally shields government officials performing discretionary functions from civil damages liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038 (1987) (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")). Whether an official may be held liable for an allegedly unlawful action generally turns on the objective reasonableness of the action, assessed in light of the legal rules that were clearly established at the time. A right is clearly established when "the contours of the right [are] . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . ." *McEvoy v. Spencer*, 124 F.3d 92, 97 (2d Cir. 1997) (citing *Anderson*, 483 U.S. 635, 107 S.Ct. 3034). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483

U.S. at 640, 107 S.Ct. at 3039 (internal citations omitted).

To defeat a claim of qualified immunity on this ground, plaintiff must show that it was not objectively reasonable for defendant to believe that his actions were "lawful at the time of the challenged conduct." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995). Objective reasonableness is established where "officers of reasonable competence could disagree" about whether or not the defendant's actions were legal. *Id.* (citing *Malley*, 475 U.S. 335, 106 S.Ct. 1092). "[A] conclusion that the defendant['s] . . . conduct was objectively reasonable as a matter of law may be appropriate where there is no dispute as to the material historical facts." *Kerman v. City of N.Y.*, 374 F.3d 93, 109 (2d Cir. 2004).

The Second Circuit has repeatedly recognized, in the context of qualified immunity, the difficult choices faced by caseworkers:

> [P]rotective services caseworkers [must] choose between difficult alternatives. . . . If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights. It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an objectively reasonable

> basis for their decision, whichever way they make it.

Tenenbaum, 193 F.3d at 596-97 (quoting *van Emrik*, 911 F.2d at 866 (footnote omitted)) (alterations in *Tenenbaum*); *see also Defore v. Premore*, 86 F.3d 48, 50 (2d Cir. 1996) (emphasizing the importance of the qualified immunity defense to ensure publicly employed caseworkers the necessary latitude to exercise their professional judgment in matters related to child welfare). In fact, "[t]his Circuit has adopted a standard governing [child protective] case workers which reflects the recognized need for unusual deference in the abuse investigation context. An investigation passes constitutional muster provided simply that case workers have a 'reasonable basis' for their findings of abuse." *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999).

Assuming *arguendo* that defendants' conduct violated plaintiffs' due process rights, there existed an objectively reasonable basis for believing that their conduct was legal, as set forth in the discussions above of due process, seizure, and malicious prosecution.[1] Even in the light most favorable to plaintiffs, I find that ACS caseworkers "of reasonable competence could disagree" on the application of the laws to these facts, and thus disagree about whether or not

[1] Any allegedly false statements made to the Family Court would not be protected by qualified immunity as no caseworker could reasonably believe that making false statements to a court is legally sound

defendants' actions were legal. For example, even if there was sufficient time consistent with Kevin's safety to seek a court order prior to his removal, I could not find that caseworkers of reasonable competence could not even disagree on whether there was sufficient time.

5. Absolute Immunity

The doctrine of absolute immunity shields prosecutors from liability related to their prosecutorial functions. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984 (1976). The Second Circuit has held that this absolute immunity extends to government litigators in civil proceedings as well. *Barrett v. U.S.*, 798 F.2d 565 (2d Cir. 1986). In *Walden v. Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984), the Circuit specifically held that an attorney representing the Monroe County Department of Special Services in child protective proceedings in Family Court was entitled to absolute immunity, because her duties in initiating and litigating those proceedings were "similar to those of a prosecuting attorney."

"The absolute immunity accorded to government prosecutors encompasses not only their conduct of trials but all of their activities that can fairly be characterized as closely associated with the conduct of litigation or potential litigation. . . ." *Barrett*, 798 F.2d at 571-72. Accordingly, absolute immunity even protects prosecutors charged with using false evidence. *Imbler*, 424 U.S. 409, 96 S.Ct. 984. Numerous

cases have applied this holding, demonstrating the wide range of extreme prosecutorial actions covered by absolute immunity. *See Barrett v. U.S.*, 622 FSupp. 574, 586 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 565 (2d Cir. 1986) (collecting cases).

Here, plaintiffs allege, among other things, that the lawyer defendants brought false and misleading charges against them; disregarded exculpatory information about Cornejo's whereabouts and did not include that information in the petitions; pressured the ME to find that Kenny's death was caused by Shaken Baby Syndrome; disregarded the instructions from the ACS caseworkers to withdraw the petition against Cornejo; concealed from the Family Court that the ME had ruled out Shaken Baby Syndrome as the cause of death; and interfered with social work efforts to reunite plaintiffs.

As the case law cited above reflects, all of these allegations can fairly be characterized as closely associated with the conduct of litigation, and thus protected by absolute immunity, except the allegations that the lawyer defendants pressured the ME to find Shaken Baby Syndrome and interfered with social work efforts. However, plaintiffs have offered no evidence in the record to support the allegations of pressuring the ME or interfering with social work. Thus, all of plaintiffs' allegations against the lawyer defendants pertain to defendants' actions incident to the filing and litigation of the petition in Family Court, are not supported by evidence in the record, or both.

Non-lawyers, such as the ACS caseworkers and supervisors, are also be [sic] entitled to absolute immunity for their actions if they can demonstrate that such complete protection is "necessary to protect the judicial process." *Hill v. City of N.Y.*, 45 F.3d 653, 660 (2d Cir. 1995); *see also Burns v. Reed*, 500 U.S. 478, 494, 111 S.Ct. 1934, 1943 (1991) (absolute immunity reflects "a concern with interference with . . . conduct closely related to the judicial process"); *Imbler*, 424 U.S. at 430, 96 S.Ct. at 995 (holding that absolute immunity extends only to those "intimately associated" with the judicial process). In *Levine v. County of Westchester*, 828 F.Supp. 238, 243-44 (S.D.N.Y. 1993), the court found that child protective agencies were entitled to absolute immunity for actions similar to those taken here, holding as follows:

> The County of Westchester, DSS, CPS, and the Westchester County Attorney as defendants (collectively, the "Westchester County defendants") are protected by absolute prosecutorial immunity. Levine's claims against these defendants appear to be based upon allegations that the County defendants ignored Levine's protestations of innocence and mistaken identity and "prosecuted the wrong person." Recognizing that "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts", *Butz v. Economou*, 438 U.S. 478, 515, 98 S.Ct. 2894, 2915, 57 L.Ed.2d 895 (1978), this Circuit has held that individuals who initiate and prosecute child protective orders

> are entitled to absolute governmental immunity in an action for damages under § 1983 for their conduct in initiating a prosecution. *Walden v. Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984). Therefore, the County defendants clearly are entitled to absolute immunity with respect to their filing and litigating the family court petitions against plaintiff despite his protestations of innocence and mistaken identity.

I hold that the ACS personnel here should likewise enjoy absolute prosecutorial immunity to the extent plaintiffs seek to hold them liable for their actions in filing and continuing to pursue the petition. In those actions, the caseworkers were acting just as prosecutors; in fact, plaintiffs seek to have both the caseworker defendants and the lawyer defendants held liable for malicious prosecution based on the filing of the same petition. The justification for providing the lawyer defendants with absolute immunity applies equally to the caseworkers on these acts. Whether the caseworkers' actions in removing Kevin without a court order are likewise intimately associated with the judicial process is dubious, but I decline to address it here.

6. Municipal Liability

Plaintiffs allege that the City had a policy that caused the violations of plaintiffs' rights or failed to adopt a policy that would have prevented the violations of plaintiffs' rights, and failed to adequately

train its caseworks and lawyers, which resulted in the alleged violations of plaintiffs' rights. In order to establish that the City or former ACS Commissioner Bell violated their constitutional rights, plaintiffs must prove that the City or ACS had a municipal policy, practice, or custom that caused a violation of the plaintiffs' rights. *Monell v. N.Y. City Dep't of Soc. Serv.*, 436 U.S. 658, 98 S.Ct. 2018 (1978). Because I find no violation of plaintiffs' rights, the claims against the City and former ACS Commissioner Bell fail.

III. Claims Under State Common Law and the Provisions of Social Services Law § 419

Plaintiffs bring state law claims against defendants for malicious prosecution and breach of duty of reasonable care, but, for the reasons below, defendants are entitled to immunity for the actions on which these claims are based.

With the enactment of the Court of Claims Act § 8,[5] "the 'State waived that immunity which it had enjoyed solely by reason of its sovereign character,' but . . . 'the State retained its immunity for those governmental actions requiring expert judgment or the exercise of discretion.'" *Brown v. State*, 89 N.Y.2d

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[5] "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations. . . ." Court of Claims Act § 8.

172, 652 N.Y.S.2d 223 (1996) (quoting *Arteaga v. State of N.Y.*, 72 N.Y.2d 212, 215-16, 532 N.Y.S.2d 57, 58-59 (1988)). "This immunity, [the New York Court of Appeals has] held, is absolute when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature." *Arteaga*, 72 N.Y.2d at 216, 532 N.Y.S.2d at 59 (citations omitted). "Whether an action receives only qualified immunity, shielding the government except when there is bad faith or the action taken is without a reasonable basis or absolute immunity, where reasonableness or bad faith is irrelevant, requires an analysis of the functions and duties of the particular governmental official or employee whose conduct is in issue." *Id.* "Where, however, the official 'has stepped outside the scope of his authority' and acted in the clear absence of all jurisdiction or without a colorable claim of authority, there is plainly no entitlement to absolute immunity, even if the underlying acts are prosecutorial or quasi-judicial in nature." *Pietra v. State of N.Y.*, 71 N.Y.2d 792, 796, 530 N.Y.S.2d 510, 511-12 (1988) (quotation and citations omitted).

In Carossia v. City of N.Y., 39 A.D.3d 429, 835 N.Y.S.2d 102 (1st Dep't 2007), the Court held, albeit with little analysis, that ACS's investigation and decision to remove a child and commence a Family Court proceeding were quasi-judicial and thus afforded absolute immunity. That conclusion is in keeping with the analysis above of defendants' absolute immunity from plaintiffs' federal claims; all of the lawyer defendants' actions and the actions of the

caseworker defendants as to the malicious prosecution claims were prosecutorial or quasi-judicial in nature. And although plaintiffs allege defendants acted unreasonably, there are no allegations supported by evidence indicating that defendants stepped outside the scope of their authority and acted in the clear absence of all jurisdiction or without a colorable claim of authority. Therefore, the attorney defendants are entitled to absolute immunity on both state law claims, and the caseworkers are entitled to absolute immunity on the malicious prosecution claim.

Assuming without deciding that the caseworkers' acts in the removal of Kevin were not quasi-judicial, they are nevertheless entitled to qualified immunity, on the claim of breach of duty of reasonable care, under the common law and under state statute. New York Social Services Law § 419 affords persons involved in the provision of child welfare services with "immunity from any liability, civil or criminal, that might otherwise result by reason of such action." "[U]nder New York Social Services Law § 419 defendants are generally presumed to have acted in good faith, [but] this presumption does not apply to liabilities resulting from 'willful misconduct or gross negligence.'" *Yuan v. Rivera,* 48 F.Supp.2d 335, 358 (S.D.N.Y. 1999) (quoting New York Social Services Law § 419). "Gross negligence is defined as 'an aggravated disregard for the rights and safety of others.'" *Mosher-Simons v. County of Allegany,* 94 Civ. 374S, 1997 WL 662512, at *6 (W.D.N.Y. Sept. 30, 1997) (quoting *Ricciardi v. Con Edison,* 161 Misc.2d

917, 918, 615 N.Y.S.2d 854, 855 (City Ct. 1994))." Thus, if a defendant's actions are reasonable then that satisfies the tests for both state common law qualified immunity and § 419 immunity.

In *Carossia*, 39 A.D.3d at 430, 835 N.Y.S.2d at 104, the court found that not only was the defendants' conduct entitled to absolute immunity but it was also shielded by the immunity extended by Social Services Law § 419. There:

> [T]he caseworker[ ] . . . was presented with serious allegations of child sexual abuse, which were seemingly confirmed to one degree or another by the child, although apparently through a series of misunderstandings as to what the child meant. Nevertheless, there was reasonable cause to suspect that the child might have been abused when the case-worker determined to remove the child and commence the Family Court proceeding. The evidence does not permit the conclusion that the caseworker failed to exercise "even slight care," or exhibited a "complete disregard for the rights and safety of others."

In *Mosher-Simons,* the court likewise found that social services defendants and child protection services defendants were entitled to common law qualified immunity and immunity under § 419. There, the plaintiffs were suing for the death of a child who had been removed from his mother by defendants, placed in foster care for two years, and then given over to the custody of his aunt, before the child died due to

abuse inflicted by his aunt. Although the evidence indicated that the defendants had failed to discover the aunt's abuse despite numerous indications of same, and the court found that a reasonable finder of fact could conclude that the defendants should have done more, the court concluded that "no reasonable finder of fact could conclude that [the defendants] acted with 'an aggravated disregard for the rights and safety of the decedent.'" *Id.* at *7.

Again, for the same reasons that defendants' conduct in the removal and investigation of plaintiffs does not constitute violations of plaintiffs' federal rights – discussed above – a rational jury could not find based on the evidence here that defendants exhibited an aggravated disregard for the rights and safety of plaintiffs. Their conduct was at least reasonable in all respects and there is no indication in the evidence that any mistakes were actually willful. Thus, I find that the defendants' actions here are entitled to the immunity provided by § 419 and New York common law.

CONCLUSION

Defendants' motions for summary judgment are granted, and the case is dismissed. The Clerk is directed to enter judgment.

SO ORDERED.

/s/ (BMC)
U.S.D.J.

Dated: Brooklyn, New York
May 16, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 5th day of March, two thousand and ten.

Docket No. 08-3069-cv (Lead), 08-3071-cv (Con)

----------x

SALLY CORNEJO, individually and
on behalf of her infant child Kevin Salas,

Plaintiff-Appellant,

– against –

WILLIAM BELL, individually and as Commissioner, KATHLEEN CERRITO, individually and as caseworker, JANICE HOGGS, individually and as supervisor, JOYCE DE NICHOLSON, individually and as manager, EUGENE WEIXEL, individually and as caseworker, RAMON VARGAS, individually and as supervisor, MAUREEN FLEMING, individually and as deputy director and City of New York, FREDDA MONN, individually and as supervising attorney, DAWN SCHWARTZ, individually and as attorney SUSAN SCHENKEL SAVITT, and THE CITY OF NEW YORK,

Defendants-Appellees.

----------x

(Filed Mar. 5, 2010)

Sally Cornejo having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court
/s/ Catherine O'Hagan Wolfe
[Seal]

FAMILY COURT OF THE STATE OF NEW YORK
QUEENS COUNTY PART #6

----------X

IN THE MATTER OF:

ACS-NY,

Petitioner,

– Vs.

Docket No.:
NA-15890-1/02

SALLY CORNEJO and
ROTHMAN SALAS,

Respondents.

----------X

	December 11, 2002
HELD AT:	Queens Family Court
BEFORE:	HONORABLE FRIEDMAN Judge
APPEARANCES:	JODI APPEL-KAPLAN Attorney for ACS
	MS. CERRITO Case Worker
	ERIN GALLAGHER Legal Aid Society
TRANSCRIBER:	KAREN SHAIN

* * *

[15] THE COURT: The reason this is an issue is what I perceive as the overall discrepancy is this case and I'll tell you what it is. If the medical doctors are credited by ACS and the ones you are relying on are so certain that the mother had nothing to do with this, I do not understand why she is a

respondent, why you do not withdraw the petition against her.

You seem to be having it both ways, you want to have it both ways. You have someone that you say has been exonerated by doctors even so that I could release a child – now you're telling me to release a child to an aunt, but she would be living in Jersey, but [16] at some point I think you were willing to release the child to the household where they were both living.

Either you credit your experts and you are confident at this stage that while there has been in my opinion not a sufficient amount of medical testimony; where there hasn't been an autopsy report, where some of these, to the layman anyway, medical disparities haven't been explained away, and you're saying she had nothing to do with it.

Why is she a respondent then, okay? Also, one other also, if the police department is so convinced that she had nothing to do with it, it seems to be there should be a much more active pursuit of the father. Because the case was very clear, the Court of Appeals case, sorry the name escapes me, it might be *People v. Lee,* but don't hold me to that, where there was a conviction on a shaken baby case, and the indictment named the two parents, either/or. And the Court of Appeals was very clear in the criminal case as saying, "No, you have to name them in [17] concert," but you cannot say either this one or that one.

If the police had one suspect, where are the charges? Where is the investigation? We have a child who is the victim of a homicide here. I'm not attributing culpable mental state. I'm not saying intentional, reckless, criminally negligent. We have a child who's a victim of a homicide. So everybody has let go of this case and is not pursuing this man when you tell me the mother has nothing to do with it? That's an absurdity.

That's not what I want the DA's office to do as a citizen or as a Judge. And in my experience, that is the last thing the DA's office has done over the years. So I don't really understand what's going on here from the child protective agency or from the District Attorney's office.

If you're ready, if you feel the mother had nothing to do with it, why is she before me as a respondent? Why should she be subject to any orders restricting her access to the child? And if you're not confident [18] enough about that, then your agency must have some open questions about the medical issue.

MS. KAPLAN: Your Honor, to be quite frank with the Court, I have only received permission to parole this child to the respondent mother. I have not received permission –

THE COURT: To the mother?

MS. KAPLAN: I thought your were referring to the mother and respondent's position.

THE COURT: I think you just misspoke. That's all I'm saying. I think you said parole to the respondent mother.

MS. KAPLAN: Oh, I'm sorry. I have only received permission to, you know, request that the Court parole the child to the mother or now clearly that would not happen to at least to the aunt. I have not received permission at this point to withdraw the petition. I don't know exactly the reasons behind that, to be quite honest with you, and I would have to consult further with supervisory personnel to give you a better [19] answer regarding that.

THE COURT: Your agency, to use a nice word, to me seems duplicitous. They're saying we're not making this decision. In the end it's the Court's decision, but you're asking me to make a very important decision on, forget not being fully informed, on less than sufficient information.

The last thing I want to do is penalize a parent who has lost one child and not have the other child with her if there's no reason to keep that child away.

* * *

(2)

No. 09-1488

IN THE
SUPREME COURT OF THE UNITED STATES

SALLY CORNEJO, individually and on behalf of her minor son Kevin Salas,

Petitioner,

v.

FREDDA MONN, JODI KAPLAN, and DAWN SCHWARTZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's holding that the municipal attorneys who initiated and pursued the underlying child-abuse proceedings were entitled to absolute immunity from liability under 42 U.S.C. § 1983, because their function was analogous to that of a prosecutor in a criminal proceeding?

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The decision of the United States Court of Appeals for the Second Circuit is reported sub nom. Cornejo v. Bell at 592 F.3d 121 (2d Cir. 2010), and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 1 through Pet. App. 18.

The memorandum and order of the United States District Court for the Eastern District of New York, sub nom. Cornejo v. Bell, No. CV-04-0341, is dated May 19, 2008 and is unpublished. It is available at 2008 U.S. Dist. LEXIS 89597 and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 19 through Pet. App. 65.

No. 09-1488

IN THE SUPREME COURT OF THE UNITED STATES

SALLY CORNEJO, individually and on behalf of her minor son Kevin Salas,

Petitioner,

v.

FREDDA MONN, JODI KAPLAN, and DAWN SCHWARTZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF FACTS

On October 31, 2002, New York City's Administration for Children's Services ("ACS") received two reports alleging child abuse with regard to six-month-old Kenny Salas. These reports indicated that Kenny had been hospitalized the day before with life-threatening injuries that appeared to have been caused by extremely violent shaking ("Shaken Baby Syndrome"), and that

Kenny had apparently sustained a rib fracture several weeks earlier.

That day, ACS's Child Protective Services division assigned a caseworker, Kathleen Cerrito, to investigate. Cerrito interviewed the physician at Long Island Jewish Hospital ("the Hospital") and Kenny's mother, petitioner Sally Cornejo ("Cornejo"). At that preliminary point in her investigation, Cerrito could not verify Cornejo's claim that she was not home when Kenny was apparently shaken. ACS also could not rule out Cornejo's responsibility for the prior rib fracture.

After consulting her supervisors, Cerrito removed Kenny's 18-month-old brother, Kevin Salas, from his parents' custody on an ex parte emergency basis, as authorized by N.Y. Fam. Ct. Act § 1024. Kevin was placed in foster care with a relative.

The next day, November 1, 2002, attorneys in ACS's Division of Legal Services prepared and filed child-abuse petitions against the parents, Cornejo and Rothman Salas ("Salas"), under Article 10 of the Family Court Act. Kenny remained hospitalized, and he died on November 7, 2002.

ACS's continued investigation substantiated Cornejo's assertion that she was not home when Kenny was allegedly shaken. The investigation indicated that Salas was the only adult caring for Kenny at that time. On November 14, 2002, the Medical Examiner advised an ACS attorney that she could not yet determine whether Kenny had died from Shaken Baby Syndrome, but she had found during the autopsy that the condition of

Kenny's rib was a congenital malformation, not a fracture.

The next day, November 15, 2002, only two weeks after Kevin's removal, ACS moved by order to show cause for Kevin's immediate return to Cornejo. ACS asked that the return be under ACS's supervision while the child-abuse proceedings were pending, a status known as "parole" (Joint Appendix ("A") at A-534-535).

At a hearing on November 19, 2002, ACS presented testimony from Kenny's physician at the Hospital, who discussed her diagnosis of Shaken Baby Syndrome, but also explained why she believed that Cornejo was not at home when Kenny was shaken. Despite the physician's testimony in support of ACS's application to return Kevin to Cornejo's custody, the Family Court ordered that Kevin remain with his aunt (A-535-539, A-541, A-544).

On the next court date, December 11, 2002, ACS reiterated its request for Kevin to be returned to Cornejo. The Family Court questioned why ACS had not sought to withdraw the abuse petitions against Cornejo (A-550, A-557, A-568).[1] After the ACS attorney consulted her supervisors, she did move to withdraw the petitions against Cornejo (which would leave them pending against Salas). However, the Family Court denied ACS's application, explaining that the Court was not

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[1] Respondents have cited pages of the Family Court transcript as they appear in the Joint Appendix. Respondents do not concede that the excerpt presented with the Petition, at Pet. App. 68-71, is an accurate reproduction.

"comfortable entertaining an application for an outright parole to the mother" in light of the medical uncertainty as to why Kenny died (A-561-562; Pet. App. 29-30).

The cause of Kenny's death was called into question when the Medical Examiner's autopsy report of January 22, 2003, concluded that Kenny had died from a heart defect, not from being shaken. Kenny's doctors at the Hospital adamantly disagreed with that conclusion, and reiterated their diagnosis of Shaken Baby Syndrome.

Consequently, a meeting was convened, attended by the physicians from the Hospital and from the Medical Examiner's Office, as well as members of the Queens County District Attorney's Office, ACS's attorneys, Cornejo's attorney, and Kevin's law guardian (A-212; A-582; A-817). The physicians from the Hospital and the Medical Examiner's Office maintained their divergent beliefs about the cause of death, but they did agree to consult an independent expert, Dr. Paul M. Weinberg, a pediatric cardiologist at Philadelphia Children's Hospital (A772-773). In addition, ACS contacted pediatric pathologist Dr. Janice Ophoven of the Crackleberry Group in Indiana (A-130).

Until these experts weighed in, ACS was reluctant to withdraw the abuse petitions against Salas. Nonetheless, even while recognizing the complexity of the medical issues, the Family Court denied ACS's requests to withdraw the petitions against Cornejo unless ACS also agreed to withdraw them against Salas (A-625).

At last, on February 4, 2003, the Family Court granted ACS's request to parole Kevin to

Cornejo under ACS's supervision. The Family Court directed Cornejo to keep Kevin within New York State while the proceedings were pending, and not to allow any contact between Kevin and Salas (A-124-125).

On April 29, 2003, Dr. Weinberg completed his report and, like the Medical Examiner, diagnosed a myocardial infarction of unknown cause (A772-773). Dr. Ophoven also could not conclude that Kenny died from being shaken. On May 20, 2003; Cornejo joined ACS in seeking dismissal of the petitions against her (A-760-771).

On June 10, 2003, ACS requested, and the Family Court finally granted, permission to withdraw the petitions as to both Cornejo and Salas (A-133-134, A-136). ACS explained that it now had "no basis to dispute the findings of the Medical Examiner," and "d[id] not believe that any evidence currently exists which could prove this Petition by a preponderance of the evidence" (A-644).

Cornejo, for herself and Kevin, sued the City of New York, the then-ACS Commissioner, and several ACS attorneys, caseworkers and supervisors. The United States District Court granted defendants' motions for summary judgment dismissing the complaint (Pet. App. at 64). The Court held, in relevant part, that the ACS attorneys were entitled to absolute immunity from liability under 42 U.S.C. § 1983 (Pet. App. 56-57). The Court followed the holding of the Second Circuit Court of Appeals in *Walden v. Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984), that an attorney representing a County Department of Special

Services in child-protective proceedings "was entitled to absolute immunity, because her duties in initiating and litigating those proceedings were 'similar to those of a prosecuting attorney'" (Pet. App. at 56).

The District Court emphasized that prosecutorial immunity covered all the "'activities that can fairly be characterized as closely associated with the conduct of litigation'" (Pet. App. at 56, quoting *Barrett v. U.S.*, 798 F.2d 565, 571-72 (2d Cir. 1986)). Furthermore, the District Court held that the ACS attorneys' absolute immunity from § 1983 liability encompassed Cornejo's contention that "the attorneys disregarded the instructions from the ACS caseworkers to withdraw the petition against Cornejo" (Pet. App. 56-57).

The Court of Appeals for the Second Circuit affirmed. The Second Circuit explained, in relevant part, that the question of whether an employee of the executive branch of government is entitled to absolute or qualified immunity turns on what this Court has called a "'functional' analysis" (Pet. App. at 10, citing *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983)). Like the District Court, the Second Circuit held that, under this analysis, absolute immunity applied to "prosecutorial activities" that were "'intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force'" (Pet. App. at 10, quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). The Second Circuit reasoned that "absolute immunity also extends to non-prosecutor officials when they are performing 'functions analogous to those of a prosecutor'" (Pet. App. at 10, quoting *Butz v.*

Economou, 438 U.S. 478, 515 (1978)). The Second Circuit explained that "[w]hile any analogy between two kinds of executive employees is never perfect, such reasoning by analogy is at the heart of judicial thinking: things that are essentially alike should be treated essentially the same" (Pet. App. at 10). Thus, the Second Circuit pointed out that, in *Butz*, this Court had applied absolute immunity to an agency official's decision to institute an administrative proceeding (Pet. App. at 10).

Consequently, the Second Circuit held, as it had in *Walden v. Wishengrad*, 745 F.2d at 152, that, given the importance of child protection activities, as well as "the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims'" arising from those activities, the ACS attorneys "must be accorded absolute immunity from § 1983 claims arising out of the performance of [their] duties" (Pet. App. at 11).

REASONS FOR DENYING THE WRIT

I. Cornejo's Fact-Based Claim Does Not Warrant This Court's Review.

The question raised by Cornejo does not present any "compelling reasons" for granting the petition. *See* Sup. Ct. R. 10. Indeed, the District Court and the Second Circuit properly applied this Court's functional analysis in determining that the ACS attorneys were entitled to absolute immunity in this case. Moreover, Cornejo's challenge to the holding of the Courts below is based on her particular interpretation of the facts of this case. The decisions below explained why that

interpretation does not undercut the application of absolute immunity, and the Courts' resolution of that issue does not warrant review by this Court.

Cornejo asserts that the child-abuse petitions brought against her had "no merit," when in fact the petitions were based on Kenny's death from what appeared to be an intentional and violent shaking, as well as his apparent prior rib fracture. ACS reasonably inferred that Kevin was in danger of being abused unless he was removed from his parents' care.

Cornejo also alleges that the ACS caseworkers were somehow the "clients" of the ACS attorneys, and that the attorneys had "contravened" the caseworkers' "instructions." Even assuming for the sake of argument that the caseworkers were the attorneys' clients, the factual record in this case does not support Cornejo's assertion of liability based on the attorneys' supposed disobedience of the caseworkers' instructions.

Kevin was placed in foster care with a relative on October 31, 2002. Cornejo contends that, in mid-November, 2002, the caseworkers instructed the attorneys to "withdraw the case against Ms. Cornejo and return Kevin to her" (Pet. at 3). Cornejo relies on the deposition testimony of Child Protective Manager Joyce De Nicholson, who could not recall when she spoke to an attorney during that period, to whom she spoke, or what she said (A-377-379).

In fact, the ACS attorneys promptly sought to have Kevin returned to Cornejo's custody as soon as they verified that she was not at home when

Kenny was allegedly shaken, and that the condition of Kenny's rib was not a fracture resulting from child abuse. ACS made this application in a November 15, 2002 order to show cause, only about two weeks after Kevin had been removed, and only one day after learning from the Medical Examiner that Kenny's suspected prior rib injury was, in fact, a congenital condition.

ACS asked that Kevin be "paroled" to Cornejo under ACS's supervision, to ensure that Kevin remained in New York City, and away from Salas, while the proceedings were pending. The Family Court denied that application, as well as the application made on December 11, 2002.

Furthermore, at the hearing on December 11, 2002, the Family Court urged ACS to move to withdraw the petitions against Cornejo, and ACS made that motion. Nonetheless, the Family Court denied the motion, even as it recognized that ACS could not withdraw the petitions without judicial approval (A-671-672). Subsequently, the Family Court refused ACS's repeated motions to withdraw the petitions against Cornejo. Thus, the Family Court, rather than the ACS attorneys, prolonged Kevin's separation from Cornejo.

After the Medical Examiner issued her report on January 22, 2003, the ACS attorneys were able to get the Family Court, at last, to parole Kevin to Cornejo, on February 4, 2003.

Nevertheless, the Family Court refused to allow ACS to withdraw the petitions against Cornejo without withdrawing them against Salas. ACS was faced with different medical opinions concerning the cause of Kenny's death, and

whether Salas was responsible for that death. Thus, the ACS attorneys sought to mediate the medical dispute before withdrawing the petitions against Salas (A-120-121, A-586, A-815-816). That judgment call is understandable, because Kenny was in Salas's care when he lost consciousness, and ACS needed to take the safer course of action and ensure that Salas presented no risk to Kevin. Moreover, as noted by the District Court, the decision whether to seek judicial permission to withdraw a petition is precisely the type of decision "incident to the filing and litigation of the petition in Family Court" that is "intimately associated" with the judicial process and therefore should be within the scope of absolute immunity (Pet. App. at 57). *See Imbler*, 424 U.S. at 430.

Therefore, Cornejo's discussion of the roles of clients and their privately-retained attorneys in the settlement of civil cases in general (Pet. at 24-26) is inapposite. For all these reasons, this is not an appropriate case for this Court's review.

II. The Courts Below Correctly Applied Absolute Immunity.

A. Precedent Supports Application of Absolute Immunity to ACS Attorneys.

This Court need not review the Second Circuit's logical application of absolute immunity in this case. Cornejo's challenge to that holding is based on only a portion of this Court's absolute-immunity analysis — the scope of common-law immunity in 1871, when § 1983 was enacted as § 1 of the Civil Rights Act.

In evaluating absolute immunity, this Court does engage in "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. Thus, the Court held in *Imbler* that the historical common-law immunity of prosecutors should translate into a prosecutor's absolute immunity from liability under § 1983 for actions taken within the scope of the prosecutor's duties as an advocate. *Id.* at 421-423.

Cornejo erroneously asserts, however, that the scope of absolute immunity depends solely on that historical analysis. According to Cornejo, in 1871, there was no mechanism to remove children from parents who abused or neglected them and, therefore, no governmental attorneys were employed to bring petitions to safeguard those children (Pet. at 12-15).

Cornejo fails to appreciate that this Court has applied absolute immunity, not just to prosecutors, but also to attorneys whose duties are analogous to those of a prosecutor, such as an agency attorney who initiates an administrative proceeding, participates in the trial, and presents evidence before the tribunal. *Butz v. Economou*, 438 U.S. 478, 515, 516 (1978); *see Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (citing the holding in *Butz* that absolute immunity encompasses "prosecutors and similar officials" and "executive officers engaged in adjudicative functions").

The policy considerations expressed by this Court in both *Imbler* and *Butz* support applying absolute immunity to ACS attorneys, even though

their precise office did not exist in 1871. This Court explained in *Butz* that an agency attorney's exercise of independent judgment in bringing a proceeding and presenting evidence could be curtailed if the attorney risked being held liable in damages. 438 U.S. at 515-516 (citing the "serious danger that the decision to authorize proceedings will provoke a retaliatory response" through litigation). Similarly, in *Imbler*, this Court pointed out that:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

Imbler, 424 U.S. at 424-425. This Court has also noted that an administrative proceeding gives a defendant "ample opportunity to challenge the legality of the proceeding," without the need for a § 1983 action. *Butz*, 438 U.S. at 515.

In *Walden v. Wishengrad*, the Second Circuit soundly applied the same analogy to a governmental attorney charged with the responsibility of protecting vulnerable children in Family Court proceedings. Even assuming that protection for children did not yet exist in 1871, a strong public interest in providing such protection has since been recognized.

Walden v. Wishengrad concerned a former child-protective caseworker's false-arrest claim

against a Department of Social Services attorney who allegedly got her arrested for failing to appear in Family Court. 745 F.2d at 150-151. The Second Circuit recognized that absolute immunity "should be accorded only in exceptional cases." *Id.* at 152. Nonetheless, the Court followed the absolute-immunity analysis in *Imbler* because "[a]s a Department attorney, Wishengrad initiates and prosecutes child protective orders and represents the interests of the Department and the County in Family Court. As such, her duties are similar to those of a prosecutor, who acts 'as an advocate for the State' in criminal matters." *Id.* (internal citation omitted). The Court emphasized that:

> Given the importance of the Department's activities, the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims, Wishengrad should be accorded absolute immunity from claims arising out of the performance of her duties. She must be allowed to perform her duties free from fear of potential lawsuits by individuals allegedly harmed by her actions.

745 F.2d at 152. Subsequently, in *Cornejo*, the District Court and Second Circuit soundly applied the same reasoning as in *Butz* and *Walden*.

Cornejo acknowledges that child-abuse proceedings are brought to protect the child (Pet. at 19, 20-21). *See Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) (noting that "the State has an urgent interest in the welfare of the child").

Cornejo does not appreciate, however, that this societal interest should entitle child-welfare attorneys to absolute immunity from liability that might otherwise affect their pursuit of those proceedings. For these reasons, this Court need not revisit the Second Circuit's holding.

B. The Attorneys Duties Gave Them Absolute Immunity.

Cornejo also mistakenly asserts that the attorneys were not entitled to absolute immunity for the particular conduct that forms the basis for her lawsuit (Pet. Br. at 14). This Court employs a "functional" approach in deciding whether an employee of the executive branch of government is entitled to absolute or qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993). Indeed, Justice Scalia cited some "curious" results emanating from the Court's functional analysis, but explained that "both *Imbler* and the 'functional' approach are so deeply embedded in our § 1983 jurisprudence that, for reasons of stare decisis, I would not abandon them now." *Kalina v. Fletcher*, 522 U.S. 118, 132, 135 (1997) (Scalia, J., concurring).

In *Imbler*, this Court listed numerous examples of duties encompassed within a prosecuting attorney's advocacy function, for which the prosecutor is immune from § 1983 liability: "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler*, 424 U.S. at 431 n.33.

The conduct cited by Cornejo in this petition is the continuation of the child-abuse proceedings (Pet. at 7). The decision whether to pursue or withdraw a Family Court petition is manifestly the function of an advocate. The District Court and Second Circuit soundly held, consistent with the reasoning of *Imbler*, that the ACS attorneys in this case were entitled to absolute immunity for those decisions (Pet. App. at 10-11, 56-57).

This Court has pointed out the breadth of absolute immunity. As it explained in *Buckley*, "the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley*, 509 U.S. at 271. Thus, a prosecutor would be immune from liability for presenting evidence at a probable-cause hearing even if, unlike this case, the attorney made or elicited false statements during that hearing. *See Buckley*, 509 U.S. at 270 (describing *Burns v. Reed*, 500 U.S. 478 (1991).

Here, by contrast, the conduct of the ACS attorneys did not even remotely approach that level of malfeasance. When the attorneys learned from the medical experts that Cornejo could not have been responsible for abusing Kenny, they immediately and aggressively pursued Kevin's return to Cornejo. Soon, they also sought withdrawal of the petition against her. Not only was Cornejo not harmed by the ACS attorneys' decisions, she would have benefited if the Family Court had chosen to grant the relief sought by ACS. However, even if she had been harmed by the decision to continue the Family Court proceedings, the ACS attorneys would be shielded from liability

by absolute immunity for their advocacy functions, as held by the District Court and Second Circuit. In sum, the logical decisions reached by the Courts below do not require review by this Court.

III. Cornejo Has Not Shown a Conflict in the Case Law or Identified an Important Federal Question to Support Her Petition for Certiorari.

Cornejo's petition fails to establish a conflict among the Circuit Courts of Appeals, or a conflict with this Court's prior cases, so as to justify her petition for certiorari. Similarly, Cornejo's speculation about the reach of the Second Circuit's decision does not merit this Court's attention.

A. Cornejo Failed to Show a Conflict Among the Circuit Courts.

The cases cited by Cornejo demonstrate consistency, rather than conflict, among the Circuit Courts of Appeals in granting absolute immunity to governmental attorneys who initiate and pursue child-protective proceedings (Pet. at 16-17). *E.g.*, *PJ v. Wagner*, 603 F.3d 1182, 1195 (10th Cir. 2010) (proceeding in juvenile court to take child into protective custody because of parents' failure to obtain proper treatment for child's cancer); *Gray v. Poole*, 243 F.3d 572, 577 (D.C. Cir. 2001) (initiating and prosecuting a child-neglect petition).

Indeed, in *Gray v. Poole*, the District of Columbia Circuit eloquently explained the basis for recognizing absolute immunity in these circumstances. The Court held that, as in the administrative proceeding described in *Butz*, the

governmental attorneys had to "'make the decision to move forward ... free from intimidation or harassment.'" *Gray*, 243 F.3d at 577 (quoting *Butz*, 438 U.S. at 516). The *Gray* court pointed out that "[t]he prospect of angry, retaliatory litigation by targets of the attorneys' actions is at least as likely in child neglect cases as in efforts to suspend the registration of commodities merchants" that were at issue in *Butz*. *Gray*, 243 F.3d at 577. In addition, the *Gray* court noted that both types of proceedings enabled the respondents to challenge the legality of the governmental actions. *Id.* The Court concluded: "If anything, the function of an attorney who litigates a Superior Court neglect action is closer to that of the prosecutor in *Imbler* than was the function of the agency attorney who litigated administrative hearings in *Butz* itself." *Gray*, 243 F.3d at 577. Accordingly the Court found the attorney immune from § 1983 liability for allegedly filing the neglect proceeding without cause and making supposedly libelous statements in the course of that proceeding. *Id.* at 577-578. Accordingly, Cornejo's petition cannot be based on a conflict in the case law.

B. The Second Circuit's Decision Does Not Apply Immunity in All Civil Litigation.

The application of absolute immunity to the ACS attorneys in this case does not open the door to an assertion of blanket immunity for all attorneys in civil litigation, as Cornejo claims (Pet. at 10-13, 16-17). Indeed, private attorneys are generally not subject to § 1983 liability because they are not acting under color of state law.

Cornejo's reliance on *Wyatt v. Cole*, 504 U.S. 158 (1992), is misplaced (Pet. at 11-12). In *Wyatt*, this Court explicitly held that a private attorney using a state replevin statute does not have the kind of qualified immunity from § 1983 liability that might be conferred upon a government official. This Court explained that qualified immunity for private actors was not supported by either a history of immunity from common-law claims such as malicious prosecution, nor by a policy justification such as a need to preserve the officials' "ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." 504 U.S. at 163-168.

Finally, the Second Circuit's holding does not alter or extend the reach of absolute immunity to all the conduct of all the attorneys who may be hired to assist governmental entities, as Cornejo alleges (Pet. at 12). Indeed, the cases Cornejo cites are distinguishable (Pet. at 22-23). In those cases, this Court employed its functional approach to determine that attorneys' activities other than advocacy, such as aiding a police investigation or holding a press conference, were not entitled to the protections of absolute immunity.

In contrast, *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) (Pet. at 12), held that a city's outside counsel might be entitled to qualified immunity for its defense of a lawsuit against the city. In this case as well, the Second Circuit's holding concerned the ACS attorneys' core advocacy function.

For all the reasons stated, the Second Circuit properly affirmed the District Court's dismissal of Cornejo's action against the ACS attorneys based upon absolute immunity. This case does not raise any issues warranting further review by this Court.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
July 6, 2010

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No. 09-1488

In The

Supreme Court of the United States

SALLY CORNEJO, individually and on behalf of her minor son Kevin Salas,

Petitioner,

v.

FREDDA MONN, JODI KAPLAN, and DAWN SCHWARTZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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I. THE INSTANT PETITION PRESENTS AN IMPORTANT QUESTION AS TO THE SCOPE OF ABSOLUTE IMMUNITY

A. Respondents Concede the Absence of Historical Analysis

Respondents concede that government attorneys who handle civil child welfare cases did not exist in 1871. (Opp.[1] 11-12) Thus, respondents impliedly accept that Congress could not have intended to preserve immunity for a segment of the profession which did not exist yet. Respondents recognize that under such circumstances, this Court has required "a considered inquiry into the immunity historically accorded to the relevant official at common law. . . ." (Opp. 11)

Respondents concede that the Second Circuit did not, in this case, consider the history of immunity afforded to municipal civil attorneys, such as respondents, in reaching its conclusion that they are entitled to absolute immunity under 42 U.S.C. §1983. Respondents do not challenge the historical analysis proposed by petitioners (Petition 9-14). Instead, respondents argue that the historical analysis is not essential because "precedent supports application of absolute immunity to ACS attorneys" (Opp. 10-14), based on policy considerations (Opp. 11). However, contrary to this Court's jurisprudence, respondents here, and the court below, have not undertaken the

[1] "Opp." refers to the Brief in Opposition to Certiorari.

historical inquiry that this Court requires as the initial step in an absolute immunity analysis. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986); Petition 9-14.

In arguing that the historical analysis may be dispensed with, and in arguing the merits of their claim for an extension of absolute immunity to municipal attorneys representing clients in civil proceedings, respondents highlight the importance of the question presented to this Court regarding the scope of absolute immunity.

B. Respondents' Functional Arguments

In support of their assertion of absolute immunity, respondents rely on a 32-year-old decision of this Court which afforded absolute immunity to attorneys who, following their clients' instructions, represented a federal agency in a proceeding to enforce federal regulations, *Butz v. Economou*, 438 U.S. 478 (1978). This Court's ruling in *Butz* concerned attorneys who represent federal officials in proceedings to enforce federal regulations. The issue of whether absolute immunity should be extended to attorneys representing local governmental clients in civil matters, and who contravene their clients' instructions, is one which *Butz* did not address. Respondents also cite to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which held that "executive officials in general, ... qualified immunity represents the norm." *Id.* at 807. *Harlow* is

inapposite to the issues presented here, since the court below did not discuss questions of qualified immunity, and petitioners do not raise those questions here.

Whether the holding of *Butz* should be extended to municipal civil attorneys is an issue that respondents clearly deem important, since they rely not only upon *Butz* but also upon *Walden v. Wishengrad*, 745 F.2d 149 (2d Cir. 1984). In *Walden*, the Second Circuit, citing *Butz*, afforded absolute immunity to a county child welfare attorney who had secured an arrest warrant for a witness who failed to comply with a subpoena in a state child welfare case. In *Walden*, the Second Circuit also did not conduct the historical analysis of the immunity afforded to county child welfare attorneys, particularly those who act in contravention of their client's instructions.

Respondents argue strenuously that they were performing prosecutorial functions in the representation of their client in the Family Court and, therefore, should be entitled to absolute immunity. (Opp. 14-15) Petitioners disagree; among other things, proceedings in the Family Court are civil in nature. (Petition 19-22) But, the fact that respondents argue the merits of their claim for an extension of absolute immunity to civil attorneys – whom they deem to be analogous to criminal prosecutors – underscores the importance of the issue proposed for review. This Court has not afforded blanket absolute immunity even to criminal prosecutors, but has used functional

analyses to evaluate those claims. *See*, *Kalina v. Fletcher*, 522 U.S. 118 (1998) (prosecutor gave sworn testimony in a warrant application); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (prosecutor fabricated evidence and held a press conference); *Burns v. Reed*, 500 U.S. 478 (1991) (prosecutor gave legal advice to police during an investigation); *see also*, Petition 22-26.

In claiming that they functioned as prosecutors, respondents specifically point to their attempts to obtain a second and third medical opinion, from doctors in other states, after the New York City Medical Examiner concluded that Ms. Cornejo's baby had died from natural causes and not child abuse. (Opp. 4) Petitioners submit that the search for evidence is a classic investigatory function, not a prosecutorial function. *See*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration . . . on the other hand.") Using the functional analysis that this Court has employed, respondents have presented an important question as to whether their actions fall within the bounds of a prosecutorial function. This Court should decide that question.

Finally, respondents' claim that "[t]he decision whether to pursue or withdraw a Family Court petition is manifestly the function of an advocate" (Opp. 15) likewise demonstrates the importance of

the issue. Petitioners absolutely disagree with that statement, and submit that the decision to pursue or settle a civil case belongs solely to the client, not the advocate. (*See* Petition 24-25) That decision is in no way a "core advocacy function." (Opp. 18) This Court should decide the legal issue of whether a municipal attorney who contravenes her client's instructions is nonetheless protected by the same absolute immunity which protects criminal prosecutors when they engage in prosecutorial functions.

C. Respondents' Public Policy Arguments

Respondents' proffered arguments in favor of absolute immunity for civil government attorneys are grounded not in law, but in pure public policy. (*See* Opp. 13-14) This Court has repeatedly rejected such public policy arguments as a basis for expanding immunity: "our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice [regarding questions of immunity], and . . . we are guided in interpreting Congress' intent by the common-law tradition." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). This Court "do[es] not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

The policy arguments made here, however, show that the issue raised by the instant case is an important question of federal law. Respondents urge that the state's "urgent interest in the welfare of the child" (Opp. 13) and "the importance of child protection activities" (Opp. 7) purportedly justify affording absolute immunity to all actions of municipal child welfare lawyers. (Opp. 7, 14). Although petitioners do not agree that government attorneys who countermand the instructions of their clients, the child welfare professionals, are acting in the interests of children, petitioners agree that child welfare and child protection raise important federal questions, which merit review by this Court. Nationwide, approximately 269,000 children were removed from their homes as a result of a child maltreatment investigation in 2008.[2] Each of those involuntary removals required some kind of court proceeding, 42 U.S.C. §672(a)(2)(ii) and, hence, the participation of attorneys.

Respondents also claim entitlement to absolute immunity so that they can "perform [their] duties free from fear of potential lawsuits by individuals allegedly harmed by her actions." (Opp. 13) However, those duties do not include disobeying their own clients' instructions.

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[2] http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter6.htm (last visited July 16, 2010).

II. THE INSTANT PETITION PRESENTS A QUESTION OF LAW, NOT OF FACT

A. The Disputed Factual Allegations Do Not Control the Pure Legal Question

The issue presented by the instant case is straightforward: does a municipal attorney who contravenes her client's instructions to settle a civil case have absolute immunity in a subsequent civil rights action? Despite the purely legal nature of the issue proposed by the petition, respondents devote the majority of their opposition to certiorari to a discussion of disputed facts. (Opp. 1-10).

Given the purely legal nature of the issue, the reliance on the factual assertions is both unusual and distracting. "Because the only question presented by the certiorari petition relates to the absolute immunity defense on which the Court of Appeals based its decision, . . . [this Court has] no occasion to comment on the validity of petitioner's underlying cause of action." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 431 n. 2 (1993). The Court of Appeals did not comment on the validity of the underlying cause of action here, recognizing that the issue of absolute immunity trumps the merits of the case. (App. 8-9) The District Court did comment, but in petitioners' favor, noting that "these facts could give rise to a question of fact as to whether probable cause continued to exist in support of the petition against Cornejo as early as November 14, at the end of the first two weeks of the investigation." (App. 49) In other words, both the Court of Appeals and the

District Court recognized, as respondents do not, that the disputed factual allegations do not determine the pure legal issue.

B. The Facts Must Be Construed in the Light Most Favorable to Petitioners

While respondents complain about Ms. Cornejo's "particular interpretation of the facts," (Opp. 7), they forget that the law requires that interpretation. The instant case comes to this Court on a motion for summary judgment, where the courts must "recite the facts . . . in the light most favorable to" Ms. Cornejo. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004). Even when the facts themselves are not in dispute, "'the inferences to be drawn from the underlying facts contained in [the affidavits, attached exhibits, and depositions submitted below] must be viewed in the light most favorable to the party opposing the motion.'" *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 862-63 (1982), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). In sum, "the issue . . . in this case is a narrow one, both substantively and procedurally. . . ." *Board of Educ., supra.*

Respondents, in their own lengthy version of the facts, have ignored the rules governing motions for summary judgment. Contrary to law, they have resolved all disputed facts in their own favor, and have drawn all inferences from those facts in their favor and against Ms. Cornejo.

In attempting to evade responsibility for their actions and omissions, respondents first blame their clients, the social workers, implying that the social workers did not instruct respondents to withdraw the case against Ms. Cornejo. That innuendo is directly contrary to the finding of the District Court, that social worker Joyce "De Nicholson instructed the . . . attorneys to withdraw the petition against Cornejo. . . ." (App. 28) Seeking to discredit their own client, respondents claim that Ms. "De Nicholson . . . could not recall when she spoke to an attorney during that period, to whom she spoke, or what she said (A-377-379[3])." (Opp. 8) That statement is simply wrong; Ms. De Nicholson told her attorney "that there was no way that this lady was at home when this baby got sick, and that the baby should go back to mom and withdraw the petition against her." (A-379) The conversation occurred "two to three weeks after the case first started." (A-378) And the attorney with whom Ms. De Nicholson spoke, whose name she had forgotten, was "the one who was going to court on the Cornejo case." (A-379)

Moreover, on February 6, 2003, nearly two months after having directed respondents to return Kevin and withdraw the case against Ms. Cornejo, the social workers completed their investigation of the allegations of child abuse. *See*, N.Y. Soc. Serv. L.

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[3] References labeled "A" are to the Joint Appendix which was filed in the Second Circuit.

§§424(6)(a), 424(7). The social workers determined that the charges of child abuse were unfounded (A-212), *i.e.*, not supported by any evidence whatsoever against either parent. N.Y. Soc. Serv. L. §412(6). Respondents nevertheless continued the case against Ms. Cornejo in the New York Family Court, contrary to their clients' instructions.

On February 10, 2003, Ms. De Nicholson confirmed, by email, that the social workers wanted the petition to be withdrawn but "Legal [*i.e.* respondents] . . . will [sic] like another medical opinion as they disagree with the M[edical] E[xaminer]'s findings. . . ." (A-168 ¶156)

Second, the respondents claim, or hint, that they did not countermand their clients' instructions: "the ACS attorneys promptly sought to have Kevin returned to Cornejo's custody as soon as they verified that she was not at home when Kenny was allegedly shaken, and that the condition of Kenny's rib was not a fracture resulting from child abuse." (Opp. 8-9, Opp. 14) However, the social workers' instructions were not merely to return Kevin to Ms. Cornejo's custody, but also to withdraw the case against her. The respondents contravened their clients' instructions to withdraw the case. Moreover, the attorneys did not seek an unfettered restoration of Ms. Cornejo's custodial rights; they grudgingly asked the judge only to "parole" Kevin to Ms. Cornejo. "A paroled child returns to live with the parent, but subject to broad supervision by ACS. For instance, ACS may demand the right to make unannounced home visits, or that

the parents participate in counseling, relocation, or other services." *Nicholson v. Scoppetta*, 344 F.3d 154, 160 (2d Cir. 2003).

Respondents' half-hearted attempt to reunite Kevin with Ms. Cornejo was doomed to failure. As the judge noted, if Ms. Cornejo "had nothing to do with" the injuries to her baby, "[w]hy should she be subject to any orders restricting her access to the child [Kevin]?" (App. 70). The answer was that respondents "want[ ] to have it both ways" (App. 69; *see also*, A-165 ¶146), contrary to their clients' instructions.

Next, the respondents blame the Family Court judge: "[t]he Family Court, rather than the ACS attorneys, prolonged Kevin's separation from Cornejo." (Opp. 9) That blame is likewise misplaced. As the judge noted, respondents' self-contradictory request to reunite Kevin with his mother while continuing to charge her with the fatal abuse of his baby brother was "duplicitous." (App. 71) The judge recognized that respondents were attempting to foist responsibility onto the court, making the judge decide an issue that should have been respondents' decision, and to do so based "on less than sufficient information." (App. 71)

Respondents also seek to hold the judge (and not themselves) responsible for failing to grant respondents' purported "repeated motions" to withdraw the case against Ms. Cornejo. (Opp. 9) Petitioners categorically deny that respondents made "repeated" motions. Respondents made at most two motions to withdraw the case, but ensured that the motions

would fail, by adding a condition that their clients had not sought and that the court was unable to grant – the condition that Ms. Cornejo be "supervised" by the social workers. (App. 29) As the Family Court judge recognized (App. 29), when a petition is dismissed, the New York "Family Court loses jurisdiction and thereafter further conditions may not be imposed." *Matter of Rasha B.*, 139 A.D.2d 962, 963, 527 N.Y.S.2d 933, 934 (4th Dept. 1988). "There is no provision in the Family Court Act for a conditional dismissal of a child neglect petition." *Matter of Dina V.*, 86 A.D.2d 875, 875-76, 447 N.Y.S.2d 296, 297 (2d Dept. 1982).

Petitioners categorically deny the assertion that respondent "asked that Kevin be 'paroled' to Cornejo under ACS's supervision [in order] to ensure that Kevin remained in New York City, and away from Salas, while the proceedings were pending." (Opp. 9) Respondents have not previously given that reason for their request for parole – contrary to their clients' instructions – and petitioners have been unable to find any support for it in the record. Moreover, since Salas had been deported (A-154 ¶82), there was no need for ACS supervision to keep Kevin away from Salas. Nor is there any reason – stated or unstated – to keep Kevin in New York City.

Petitioners likewise deny that respondents "sought to mediate the medical dispute." (Opp. 9-10) Respondents' clients did not think there was a material medical dispute when they directed their

attorneys, respondents herein, to withdraw the case against Ms. Cornejo and return Kevin to her custody. Indeed, the supposed dispute concerned Ms. Cornejo's fiancé (Kevin's father) only and was thus irrelevant to Ms. Cornejo and Kevin. "The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct – real or imagined – of the other parent." *Wallis v. Spencer*, 202 F.3d 1126, 1142 n. 14 (9th Cir. 2003). In fact, the record does not reflect any attempts to "mediate" a dispute. To the extent that respondents consider seeking a second, and then a third, medical opinion from out-of-state physicians to be a form of mediation, petitioners submit that that type of "mediation" is part of the investigatory function, not the advocacy function. *See*, *Buckley, supra*, at 274-75. Even if respondents, as attorneys with clients, were entitled to make a "judgment call" as a matter of law, respondents' claim that their "judgment call is understandable (Opp. 10), although it contravened their clients' instructions, raises a factual issue which should be determined by a jury.

CONCLUSION

For all the aforementioned reasons, petitioners respectfully pray that the writ of certiorari be granted.

Dated: New York, New York
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